No. 98-564-ATX Title: William Jefferson Clinton, President of the United States, et al., Appellants
v.
Matthew Glavin, et al.

Docketed:
October 2, 1998 Court: United States District Court for the Eastern District of Virginia

Entry	Date	Proceedings and Orders
	Oct 2 1998	Statement as to jurisdiction filed. (Response due November 1, 1998)
	Oct 2 1998	Motion of the parties to expediate consideration of the jurisdictional statement and to set an expedited briefing schedule filed.
	Oct 5 1998	DISTRIBUTED. October 9, 1998 (Page 21)
	Oct 6 1998	Response of intervenors City of Los Angeles, et al. to motion to expedite filed.
	Oct 6 1998	Response of intervenors Richard Gephardt, et al. to motion to expedite filed.
	Oct 6 1998	Appellees' opposition to response of putative intervenors filed.
	Oct 9 1998	Motion of the parties to expediate consideration of the jurisdictional statement and to set an expedited briefing schedule GRANTED.
	Oct 9 1998	PROBABLE JURISDICTION NOTED. The brief of the Solicitor General is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Tuesday, October 20, 1998. The briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, November 4, 1998. A reply brief, if any, is to be filed with the Clerk and served uopn opposing counsel on or before Tuesday, November 17, 1998. Rule 29.2 does not apply. The case is consolidated for oral argument on Monday, November 30, 1998, with No. 98-404, Department of Commerce v. United States House of Representatives, and a total one one and one-half hours are allotted for oral argument.
		**********
	Oct 14 1998	Waiver of right of appellees National Korean Amer. Serv. & Educ. Consortium,Inc., et al. to respond filed.
	Oct 16 1998	Motion of appellees for divided argument filed.
	Oct 19 1998	Joint appendix filed.
	Oct 20 1998	Brief of appellants William Jefferson Clinton, et al. filed at invitation of Court.
	Oct 20 1998	Brief of intervenors City of Los Angeles, et al. filed.
	Oct 20 1998	Brief of intervenors Richard A. Gephardt, et al. filed.
	Oct 20 1998	Brief of intervenors National Korean Amer. Serv. & Educ. Consortium,Inc., et al. filed.
	Oct 20 1998	Brief amicus curiae of District of Columbia filed.
	Oct 20 1998	Motion of National Korean American Service & Education Consortium, Inc., et al. for leave to intervene as appellees received. (NP)
	Oct 20 1998	Motion of Richard Gephardt, et al., for leave to intervene as appellees received. (NP)

No. 98-564-ATX

Entry	Date	Proceedings and Orders
	Oct 28 1998	CIRCULATED.
	Nov 2 1998	Motion of appellees for divided argument GRANTED.
	Nov 3 1998	Brief amicus curiae of City of Omaha, Nebraska, filed.
	Nov 3 1998	Brief amici curiae of National Citizens Legal Network, et al. filed.
	Nov 4 1998	Brief amicus curiae of Landmark Legal Foundation filed.
	Nov 6 1998	Brief of appellees Matthew Glavin, et al. filed.
	Nov 17 1998	Reply brief of appellees California Legislature, et al. filed. VIDED.
	Nov 17 1998	Reply brief of appellees City of Los Angeles, et al. filed. VIDED.
	Nov 17 1998	Reply brief of appellants filed.
	Nov 17 1998	Reply brief of appellees Richard A. Gephardt, et al. filed. VIDED.
	Nov 18 1998	Record requested.
	Nov 19 1998	Record filed.
	Nov 30 1998	ARGUED.

Supreme Court, U.S.
FILED

98 564 OCT 2 1998

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

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55 pp

QUESTIONS PRESENTED

1. Whether the instant challenge to the Secretary of Commerce's current plan for the year 2000 census presents a justiciable controversy satisfying the requirements of Article III of the Constitution.

2. Whether the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Whether the Secretary's plan for the 2000 census violates either Article I, Section 2 of the Constitution, or Section 2 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census. The appellees, who were plaintiffs in the district court, are Matthew Glavin; Robert Barr; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresanta; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn; and Cobb County, Georgia.[1]

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[1] Four groups of litigants—Richard A. Gephardt, et al.; the Legislature of the State of California, et al.; the City of Los Angeles, et al.; and the National Korean American Service & Education Consortium, Inc., et al.—moved for leave to intervene as defendants in the district court. In addition, appellees sought leave to file an amended complaint naming additional plaintiffs. The district court did not rule on either the motions to intervene or the request to include additional plaintiffs. Although the court's opinion is not entirely clear on this point, the list of plaintiffs and defendants included at the beginning of the opinion (see App., *infra*, 1a) indicates that the district court did not regard either the putative intervenors or the putative additional plaintiffs as parties to the case. But see *id.* at 2a ("Now before the Court are the defendants' and intervenor-defendants' motions to dismiss the plaintiffs' complaint."); *id.* at 11a (referring to Delaware County, Pennsylvania, as though it were a plaintiff, even though Delaware County is not included in the list of plaintiffs at the outset of the opinion).

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-23a) is not yet reported.

JURISDICTION

The opinion and order of the district court were entered on September 24, 1998 (App., *infra*, 1a-23a). A notice of appeal (App., *infra*, 37a-39a) was filed on September 25, 1998. The jurisdiction of this Court is invoked under Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2482.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at App., *infra*, 24a.

2. Section 2 of the Fourteenth Amendment to the United States Constitution is reproduced at App., *infra*, 24a-25a.

3. Section 2a of Title 2, United States Code, is reproduced at App., *infra*, 25a-27a.

4. Sections 141 and 195 of Title 13, United States Code, are reproduced at App., *infra*, 27a-30a.

5. Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2480-2483, is reproduced at App., *infra*, 31a-36a.

STATEMENT

This case involves a statutory and constitutional challenge to the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000. In the proceedings below, the District Court for the Eastern District of Virginia held that the Department's plan is inconsistent with the Census Act and is therefore unlawful. App., *infra*, 1a-23a. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. On September 10, 1998, this Court noted probable jurisdiction in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404, which held the

Secretary's plan to be invalid on essentially the same basis.

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* In addition, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

2. The Census Act states that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. 141(a). The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported by the Secretary to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Within one week after the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455

(1992). Within 15 days after receiving that statement, the Clerk of the House must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996).

The Census Act provides that the Secretary may conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). The Act further states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

"[T]he sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." 1998 Appropriations Act, § 209(a)(2), 111 Stat. 2481. The decennial census has historically been used, however, to collect a variety of information in addition to the state-level population figures that are used in apportioning Representatives among the States. In particular, the Census Act provides for the collection of population figures for geographical subdivisions within the States. 13 U.S.C. 141(c). The Act requires that "[t]abulations of population" for substate areas "shall be completed by [the Secretary] as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State." *Ibid.*

3. Much of the factual background of this case is set forth in the jurisdictional statement in *United States Department of Commerce, et al.* v. *United States House*

of Representatives, et al., No. 98-404. As that jurisdictional statement explains, the Department of Commerce has concluded that use of statistical sampling mechanisms in the conduct of the 2000 decennial census will increase the accuracy of the census while reducing its cost. As directed by statute, see Pub. L. No. 105-18, Tit. VIII, 111 Stat. 217, the Department forwarded to Congress a detailed report describing the methods by which it plans to conduct the 2000 census. See *U.S.* Bureau of the Census, Department of Commerce, *Report to Congress–The Plan for Census 2000* (Aug. 1997) (*Report to Congress*).[2]

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[2] Two forms of statistical sampling are at issue in this litigation. First, the Commerce Department intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, approximately 65% of all U.S. households returned the census forms sent to them by mail. Census Bureau enumerators visited non-responding households as many as six times before relying on other means to attempt to ascertain the number of persons residing there. For the 2000 census, the Census Bureau plans to secure information from a randomly selected sample of non-responding households; its objective is to obtain responses through either mail response or NRFU from 90% of the housing units in each census tract. The Bureau will then determine the likely number of persons living in other non-responding units based on the sample data. *Report to Congress* at 26-29.

Second, after the initial phase of the census, the Commerce Department plans to conduct a survey of approximately 750,000 housing units furnishing a representative sample of a wide variety of demographic groups, defined by such categories as race, age, urban or rural place of residence, and status as a homeowner or renter. By comparing the results of that survey to those of the initial phase of the census, the Department will assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. Based on the results of the sample, the Bureau will then determine population figures for

After receiving the *Report to Congress*, Congress enacted the 1998 Appropriations Act. Section 209(b) of that Act provides that

> [a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

111 Stat. 2481. Section 209(c)(2) states that the *Report to Congress*, together with the Commerce Department's Census 2000 Operational Plan, "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 111 Stat. 2482. Section 209(e)(1) states that any civil action brought pursuant to the Act shall be heard by a three-judge district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*

4. The plaintiffs in this case (appellees in this Court) are 16 individuals and Cobb County, Georgia. They filed suit pursuant to the judicial review provision of Section 209(e)(1), contending that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act; Article I, Section 2 of the

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States and political subdivisions nationwide. *Report to Congress* at 29-32.

Constitution; and Section 2 of the Fourteenth Amendment. President William Jefferson Clinton, the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau (collectively Commerce Department) were named as defendants. The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. Appellees moved for summary judgment. The district court denied the Commerce Department's motion to dismiss and granted the appellees' motion for summary judgment. App., *infra*, 1a-23a.

a. The district court concluded that the appellees "meet the [Article III] requirements of having a personal stake in the outcome of the controversy." App., *infra*, 10a. The court identified four distinct categories of cognizable injuries. First, the court stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." *Id.* at 11a. Second, the court accepted the allegation "that the plan will dilute the voting strength of [appellees] at the intrastate level" because "several [appellees] reside in counties whose relative population will be diminished by operation of the Department's plan." *Ibid.* Third, the court held that appellees had properly alleged a cognizable injury in the form of loss of federal funding to the States and/or substate areas in which they reside. *Id.* at 11a-12a. Finally, the district court concluded that the appellees would be injured by the Commerce Department's plan for the 2000 census because if the plan is implemented and the census is subsequently declared invalid by a reviewing court,

"any elections in 2002 will have to be held on the basis of an incorrect number of representatives and malapportioned districts which reflect the 1990 census results." *Id.* at 12a. The court further held that the alleged injuries were sufficiently immediate and certain to occur to satisfy Article III requirements, *id.* at 7a-9a, and that those injuries were properly attributable to the Commerce Department, *id.* at 14a-15a.[3]

b. On the merits, the district court held that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act. The court stated

[3] With respect to the first three categories of harms, appellees' contention that they would be injured by implementation of the Secretary's plan depends on the proposition that particular States or political subdivisions would be credited with a larger share of the country's population under a year 2000 census that did not employ statistical sampling techniques. Appellees submitted the affidavit of Dr. Ronald E. Weber, who expressed the view that such areas can presently be identified with a reasonable degree of confidence. Dr. Weber stated, in particular, that "[c]omparing seat allocations based on the 2000 projected populations under a traditional enumeration with 2000 projected populations under the Department's Plan, the States which stand a substantial likelihood of losing a seat are Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin." Weber Affidavit at 12. The government submitted its own affidavits contesting Dr. Weber's methodology and conclusions. See GXs 13, 14. One of the government's affiants "conclude[d] that no one can predict the state-by-state population of the United States as of April 1, 2000 with the exactitude required by the Method of Equal Proportions." GX 13 at 2. The government also pointed out that appellees, having moved for summary judgment on the merits, bore the burden not only of alleging but also of establishing with factual specificity their standing to sue. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 13 n.6, 45 (filed May 22, 1998). The district court did not address this latter point.

that "Congress has spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment." App., *infra*, 16a-17a. The court construed the opening proviso of 13 U.S.C. 195 as unambiguously prohibiting the use of sampling for apportionment purposes. App., *infra*, 18a-19a. Insofar as that prohibition might conflict with the affirmative grant of authority to use sampling contained in 13 U.S.C. 141(a), the court reasoned, Section 195 is the more specific of the two provisions and should therefore prevail. App., *infra*, 20a. The court concluded that "the only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes." *Id.* at 21a.

c. Because the district court concluded that the Secretary's plan for the 2000 census violates the Census Act, it declined to resolve the question whether the plan is consistent with Article I, Section 2, Clause 3 of the Constitution. App., *infra*, 16a-17a & n.2, 21a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress has vested this Court with direct appellate jurisdiction over district court decisions in suits challenging the Commerce Department's plan for the year 2000 decennial census. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This case falls squarely within the Court's appellate jurisdiction under that statutory provision. On September 10, 1998, this Court noted probable jurisdiction in *United States Department of Commerce, et al.* v. *United States*

House of Representatives, et al., No. 98-404. That case also involves a suit brought under Section 209(e)(1) of the 1998 Appropriations Act challenging the Commerce Department's plan for the 2000 census.

The instant case involves essentially the same statutory and constitutional challenges to the Commerce Department's plan as does the suit brought by the House of Representatives. The district court in each of the two cases concluded that the plan violates 13 U.S.C. 195 and is therefore invalid. If it were clear that the suit brought by the House is justiciable, the Court could simply hold the jurisdictional statement in the instant case pending its disposition of No. 98-404.

As our jurisdictional statement in No. 98-404 explains (at 13-15), however, we do not believe that the suit filed by the House of Representatives satisfies the requirements of Article III. Although we believe that the appellees in the instant case also lack standing to sue, the jurisdictional issues presented by the two cases are quite distinct. A holding by this Court that the suit brought by the House of Representatives does not satisfy the justiciability requirements of Article III therefore would not necessarily require the conclusion that this suit is also nonjusticiable. As our jurisdictional statement in No. 98-404 indicates (at 12-13), a prompt ruling by this Court as to the legality of the plan for the 2000 census would have significant practical advantages, if the Court were to determine that such a ruling can be issued consistent with the requirements of Article III. The Court should therefore note probable jurisdiction in this case as well.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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OCTOBER 1998

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 98-207-A

MATTHEW GLAVIN, ET AL., PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL., DEFENDANTS

[Filed: Sept. 24, 1998]

MEMORANDUM OPINION

This case comes before the Court on the defendants' motion to dismiss and the plaintiffs' motion for summary judgment. Plaintiffs, Matthew Glavin, Robert Barr, Gary A. Hofmeister, Stephen Gons, James F. McLaughlin, David H. Glavin, John Taylor, Deborah Hardman, Craig Martin, Jim Lacy, Judy Cresanta, Helen V. England, Amie S. Carter, Robert Richard Dennik, Michael T. James, William J. Byrn, and Cobb County, Georgia, seek summary judgment against Defendants, William J. Clinton, The United States Department of Commerce; William M. Daley; Bureau of the Census and James F. Holmes in this action challenging defendants' plan for the 2000 census.

Plaintiffs claim that using statistical sampling to supplement the head count enumeration used to apportion representatives among the states violates the Census Act of 1976, 13 U.S.C. §§ 21, 195, and Article I, Section 2, Clause 3 of the Constitution. Plaintiffs seek a declaration that statistical sampling is unlawful and/or unconstitutional and an injunction preventing defendants from using statistical sampling in the 2000 census. The defendants seek dismissal of Plaintiffs' complaint on the grounds this case is not ripe for adjudication and that the plaintiffs lack personal standing to be parties in this case.

Now before the Court are the defendants' and intervenor-defendants' motions to dismiss the plaintiffs' complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, and Plaintiffs' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For reasons stated below, the motions to dismiss will be denied and plaintiffs' motion for summary judgment will be granted.

I. BACKGROUND

Since 1790, the United States government has followed the constitutional command of Article I, Section 2, Clause 3 by carrying out a decennial census to allocate seats in the House of Representatives. In 1990, the Census Bureau instituted new outreach and promotion efforts to count the entire population, spending over $2.6 billion. The 1990 estimated net undercount rate was 1.6%. Certain minorities, notably African-Americans and Hispanics, had higher undercount rates than the population as a whole. Children and those living in rural areas also were differentially undercounted.

In response to the persistent undercount, in November 1990, the Secretary of Commerce established the "Task Force for Designing the Year 2000 Census and Census Related Activities for 2000-2009." Also, Congress passed the Decennial Census Improvement Act of 1991 directing the National Academy of Sciences to study the means by which the Government could achieve the most accurate population count possible, specifically considering the appropriateness of using sampling methods. The Academy found that statistical sampling should be used both for non-response follow-up and to increase accuracy. Relying on the results of the studies, the Census Bureau formulated its own plan for Census 2000.

The Secretary of Commerce's census plan will include sampling in at least three different programs of Census 2000. First, the Bureau will use sampling in the Postal Vacancy Check program, to verify housing units identified as vacant by the United States Postal Service. Second, the Census Bureau will use statistical sampling techniques to complete its traditional enumeration, an operation referred to as "Non-response Follow-up" or "NRFU." Third, the Bureau will use sampling techniques to improve the accuracy of Census 2000 with a post-census survey, an operation the Bureau calls "Integrated Coverage Measurement" or "ICM." The Bureau's plan to use sampling in the Postal Vacancy Check is not in dispute in this lawsuit.

Over 60% of households mailed back their questionnaires in 1990, and the Bureau expects a similar mail response rate in 2000. In 1990, the Census Bureau sent enumerators to all non-responding households before relying on proxy data (information obtained from neighbors) or imputation data (computer-inferred data which are based on the assumption that the household

has characteristics similar to other residences in the area). To account for those housing units that do not mail back forms in 2000, the Bureau's plan is to select at random the number of households that need to be counted in order to count 90 percent of the addresses in a census tract to whom questionnaires were mailed.

After the 90 percent goal has been reached, the Department will then add to its actual population count an estimate of the number of people in the households that were not selected for non-response follow-up. Thus, ten percent of the non-response follow-up units will not be physically counted. In making this estimate, the Department will not assume that the overall composition of these persons reflects the 90 percent of the people who were actually counted, but rather the plan is predicated on the assumption that these virtual persons will mirror the racial and ethnic composition of the persons who are identified in non-response follow-up.

The second phase of the enumeration is the Integrated Coverage Measurement survey, in which Census Enumerators will conduct interviews in a random population sample, separate from each state, to determine what proportion of the people living in the sample blocks were included in the initial enumeration. The Census Bureau's plan will classify each of the country's seven million blocks into groups known as sampling strata based on the characteristics of the block's residents according to the 1990 Census results, such as racial and ethnic composition, proportion of homeowners to renters, etc. The Bureau will select a controlled scientific sample of these blocks and enumerators will then conduct an independent second roster and ICM interview.

Each person and each enumeration is then assigned to a unique poststratum, a group of persons having similar probability of having been enumerated in the initial phase.[1] The Bureau will then estimate the number of persons in each poststratum who were correctly counted, missed, or over counted in the initial data collection phase. The Bureau will use that estimate to create an adjustment factor for each poststratum, and then multiply the number of people counted in each poststratum in the initial data collection phase by the appropriate adjustment factor to adjust the census count synthetically. Once the adjustment factors have been applied to each poststratum in a block, the statistically adjusted population figures for each block will be aggregated at the tract, county, state and national levels. This will be the reported population number used for Congressional apportionment and other purposes.

In its Report to Congress, the Bureau estimated that the total undercount of the national population in 2000 would be 1.9% if it relies on traditional methods of enumeration alone. The expected error rates for the Bureau's proposed plan vary according to the geographic level—with higher error rates at lower levels of geography (blocks, for example) and lower error rates at higher levels of geography (counties and states, for example). The Bureau expects that by using statistical sampling, it can achieve a lower error at the national, state, and Congressional district levels than it can without using sampling.

Employing statistical processes to include those who would be left out of the 2000 Census has sparked fierce

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[1] A poststratum could be all people within a state having the same sex, age, and racial/ethnic group.

debate within the political branches of the federal government since at least 1990, when it became apparent that the manner of enumerating used in the last two decennial censuses failed to ameliorate the differential undercount. In 1997, Congress attempted to amend 13 U.S.C. § 141(a) to provide: "[n]othwithstanding any other provision of law, no sampling or any other statistical procedure, including any statistical adjustment, may be used in any determination of population for purposes of the apportionment of Representatives in [C]ongress among the several States." H.R. 1469, tit. VIII (b)(1), at 65. The President vetoed this bill, in part due to the prohibition of the use of sampling in Census 2000.

Following the veto, Congress passed legislation requiring the Census Bureau to provide the Report to Congress. *See*, Pub. L. 105-18, tit. VIII, 111 Stat. 158, 217 (1997). After receiving the Report to Congress, Congress and the President continued negotiations regarding sampling in the context of the legislation necessary to fund the Commerce Department for Fiscal Year 1998. The political branches eventually reached a compromise allowing the funding of the Commerce Department for Fiscal Year 1998. That compromise is embodied in Sections 209 and 210 of the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2480-87 (1997). The Act contains separate provisions relating to lawsuits to challenge the use of sampling in Census 2000.

Section 209(b) of the Appropriations Act provides a cause of action to "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any other provision of law (other than this Act) in connection with the 2000 or any later decennial census,

to determine the population for purposes of the apportionment or redistricting members in Congress." Section 209(c)(2) provides that the Report to Congress "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding."

II. CASE IS RIPE FOR REVIEW

As a threshold matter, we note that the judicial review provision contained in the 1998 Appropriations Act eliminated all prudential ripeness concerns. *See Raines v. Byrd*, 117 S. Ct. 2312, 2318 & n.3 (1997). To the extent that the ripeness doctrine has force under Article III, the Supreme Court's precedents clearly demonstrate that this case is ripe for review. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

Given the finality of the Department's decision to utilize statistical sampling as a means to determining the population for the purposes of congressional apportionment in Census 2000, it is clear that ripeness concerns have no application in the instant case. The Department has acknowledged the finality of its decisions in its formal written reports submitted to Congress. Likewise, the Department's Operational Plan states that "sampling for non-response will be used to complete the census enumeration." As read in the Appropriations Act of 1998 § 209 (c)(2), the Census 2000 Operational Plan "shall be deemed to constitute *final agency action* regarding the use of statistical methods in the 2000 decennial census," thus making the question of use ripe for adjudication. Appropriations Act of 1998 § 209 (c)(2) (emphasis added).

Defendant's suggests that the case is not ripe because "Congress has not reached its ultimate legislative conclusion regarding a sampling census." Although it is certainly possibly that Congress may seek to prevent the Department from conducting its plan to utilize sampling, there is no legal significance to this observation. Congress may always moot out a controversy by passing new legislation, but that fact does not shield agency action from judicial review. There is always the possibility that settlement or some external event will render a case moot, but that hardly renders the litigation nonjusticiable before that event occurs. If the government's view were correct, then no agency action could ever be reviewed so long as Congress might intervene by passing new legislation that might overrule the final agency determination. *See New York v. United States*, 505 U.S. 144, 175 (1992) (holding case ripe for review even though provision at issue would not take effect until three and a half years after the Court's decision during which time Congress could have repealed the provision); *see also Duke Power Co. v. Carolina Enytl. Study Group. Inc.*, 438 U.S. 59 (1978) (holding that even when the event that would cause the damage had not yet occurred, the claims in the case were still ripe for review); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (holding where no further factual development is necessary to further illuminate the legal issues presented ripeness concerns are not implicated).

In the instant case, Plaintiffs challenge the defendants' use of statistical sampling in connection with the conduct of the census for congressional apportionment purposes. There is no material dispute as to the form that such sampling will take, and this action is justiciable on the merits presenting a question of statutory interpretation.

III. STANDING

In considering a motion to dismiss for lack of standing, the Court must accept all material allegations contained in the complaint as true and must construe all such allegations in favor of standing. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). Moreover, for purposes of determining the standing of Plaintiffs to sue, the Court must assume the validity of Plaintiffs' claim that the Constitution and the Census Act require an actual enumeration and forbid the use of statistical sampling to determine the population for purposes of apportionment. *See Warth v. Seldin*, 422 U.S. at 501.

Plaintiffs clearly satisfy the constitutional requirements for standing imposed by Article III. There are several distinct, concrete injuries that the plaintiffs will imminently suffer if the Department's plan is implemented.

The plaintiffs do not need to prove with mathematical certainty the degree to which they will be injured by the Department's plan, as compared to a head count. Courts have never required such a showing under Article III especially in the context of a motion to dismiss where courts "presume that general allegations embrace those specific facts that are necessary to support [each] claim." *Bennett v. Spear*, 117 S. Ct. 1154, 1164 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). General factual allegations of injury resulting from Defendants' conduct may suffice to establish Plaintiffs' Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 561; *see also Tucker v. United States Dept. of Commerce*, 958 F.2d

1411, 1415 (7th Cir. 1992) (holding requirements of Article III were met in a challenge to the validity of the census where Plaintiffs alleged "some probability of a tangible benefit from winning the suit").

The plaintiffs have demonstrated that they will suffer injury as a result of the Department's plan, because they are able to calculate its effects by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000. Courts have consistently found that plaintiffs challenging the census have satisfied the requirements of Article III standing where they have made allegations similar to those contained in the Complaint in this case. *See City of Detroit v. Franklin*, 4 F.3d 1367, 1374-75 (6th Cir. 1993) (holding that plaintiffs had "standing to challenge the defendants' actions based upon their claim that the census undercount will result in a loss of federal funds"); *State of Texas v. Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1990), *rev'd on other grounds*, 653 F.2d 732 (2d Cir. 1981) ("individual plaintiffs in this case have alleged concrete harm in the form of dilution of their votes and decreased federal funds flowing to their city and state, thus establishing their standing"). The requirements of Article III are satisfied where a litigant has a "personal stake in the outcome of the controversy." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Here, Plaintiffs' claims of vote dilution and loss of federal funding meet the requirements of having a personal stake in the outcome of the controversy.

Individual citizens have standing to allege vote dilution resulting from allegedly unlawful legislative apportionment. *See Baker v. Carr*, 369 U.S. 186 (1962) (holding that plaintiffs, Tennessee voters, had a "plain,

direct, and adequate" interest in maintaining the effectiveness of their votes and therefore had standing to maintain the action). Plaintiffs are individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan.

Plaintiffs allege that the plan will dilute the voting strength of Plaintiffs at the intrastate level. Specifically, several plaintiffs reside in counties whose relative population will be diminished by operation of the Department's plan. This "elimination" of population constitutes vote dilution and a tangible injury resulting from the use of sampling. But for this statistical "adjustment," Plaintiffs' counties would have a larger population. When the population of neighboring counties is being increased by the addition of computer generated persons, this injury is compounded. Plaintiffs who reside in counties which will have their population increased by less than the average of the other counties in their state will necessarily suffer a loss in relative political representation.

Plaintiffs allege threatened injury in the form of loss of federal funds, and that the county plaintiffs will suffer a concrete injury as a consequence of the Department's plan. Specifically, Delaware County, Pennsylvania will have its proportional population decreased if statistical sampling is utilized in connection with Census 2000. Under the Post-Enumeration Survey from 1990, Delaware County had its absolute population reduced–the Department subtracted over 2,000 people who had been physically counted–by virtue of the statistical methodology which the Department proposes to utilize in Census 2000. Economic injury resulting

from statistical sampling satisfies the requirements of Article III standing. *See City of Detroit v. Franklin*, 4 F.3d at 1374-75; *City of Willacoochee, Ga. v. Balridge*, 556 F. Supp. 551, 554 (S.D. Ga. 1983).

The Department's failure to conduct a proper enumeration may injure the plaintiffs where in the absence of population figures that comply with federal law, any elections in 2002 will have to be held on the basis of an incorrect number of representatives and malapportioned districts which reflect the 1990 census results. The Department will not be able to conduct a timely and complete, traditional enumeration if its plan is implemented and subsequently invalidated.

It appears to be virtually certain that Georgia will receive at least one additional congressional seat after the completion of a decennial census in the year 2000, regardless of whether the Department's plan or a traditional enumeration is used to conduct the census. Thus, Plaintiffs Matthew Glavin and William Byrne will have their votes diluted if they are forced to participate in an election in 2002 in which Georgia does not have the additional seat in Congress. Thus, Glavin, who resides in Forsyth County, Georgia, which has grown at a rate of 71% since 1990, as compared to an overall growth rate of 15.6% for the state of Georgia, will have his vote diluted in intrastate elections if the 1990 census numbers continue to be utilized beyond the 2000 elections. This same injury will be visited upon the county plaintiffs that have enjoyed a higher rate of population growth than their states since 1990. The population of Cobb County, Georgia, has grown by 23.1% since 1990, as compared to an overall population growth of 15.6% throughout Georgia. Thus, if there is no valid decennial census in place after the year 2000, Cobb County will

receive fewer state and federal funds than it otherwise would if the Department had conducted a lawful census.

Plaintiffs are challenging the procedure by which Defendants intend to take the 2000 census, and it is well-established that a party may "seek[] to enforce a procedural requirement the disregard of which could impair a separate concrete interest[]" and that in such an action, the normal standard of immediacy does not apply. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 572.

Plaintiffs need not await the consummation of threatened injury to obtain preventive relief. *See Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982). Plaintiffs injuries are imminent for several reasons. First, the Department has committed itself to use statistical sampling in Census 2000. The methodology, which parallels that used in 1990 Post-Enumeration Survey, will have the effect of reducing the relative population of those areas in which Plaintiffs reside. Moreover, the county plaintiffs also will be adversely affected by statistical sampling. Second, irrespective of the actual effect of sampling, Plaintiffs will suffer injuries as a consequence of Defendants' failure to conduct a lawful census in a timely manner. This injury appears certain to occur and thus is premature only if a plaintiff must actually suffer a threatened injury prior to obtaining preventive relief. A plaintiff is not required to wait until a defendant engages in unlawful, unconstitutional conduct to have standing to seek judicial redress. *See Blum v. Yaretsky*, 457 U.S. at 991; *Pennell v. City of San Jose*, 495 U.S. 1 (1988); *Bennet v. Spear*, 117 S. Ct. at 1163-64 (holding general allegations of injury satisfy requirements of Article III, and a plaintiff need not allege each specific subsidiary fact that supports its general claim of injury).

Plaintiffs injuries are "fairly traceable" to Defendants' use of statistical sampling in the Census 2000. To satisfy the "fairly traceable" element of standing, a plaintiff need only show that the defendant's conduct complained of is a "but for" cause of the plaintiff's alleged injury. *See Duke Power Co. v. Carolina Enytl. Study Group, Inc.*, 438 U.S. at 59. Here, there is a direct causal connection between Defendants' use of statistical sampling and Plaintiffs' loss of political representation. States are neither constitutionally nor federally compelled to use census data in determining their congressional districts. A state's choice to use such data for this purpose constitutes an "intervening" action that may break the chain of causation between challenged actions and alleged injury. The Supreme Court, however, has held that a defendant's action need not be the "very last step in the chain of causation" to establish that plaintiff's injuries are fairly traceable to defendants' conduct for the purpose of satisfying Article III. *See Bennet v. Spear*, 117 S. Ct. at 1164.

Courts recognize that there is a direct correlation between decennial census population counts and federal and state funding allocations. *See Wisconsin v. City of New York*, 517 U.S. 1, 5-6 (1996) (stating, "The Federal government considers census data in dispensing funds through federal programs to the States. . ."); *City of Detroit v. Franklin*, 4 F.3d at 1374 (stating, "It is undisputed, however, that many federal programs do disburse funds based upon population figures as reported in the decennial census"); *Tucker v. United States Dept. of Commerce*, 958 F.2d at 1415 (stating, "there is no doubt that, as a matter of fact, the allocation of state and federal funds is heavily influenced by census figures. . ."). As a matter of law, allegations of decreased federal and state funding is fairly traceable

to population counts reported in the decennial census. *See City of Detroit*, 4 F.3d at 1374. Plaintiffs affidavits establish that the implementation of statistical sampling in the 2000 census will directly result in a decrease of federal funding to the states and counties in which Plaintiffs reside.

Finally, a favorable decision will redress Plaintiffs' injuries. Redressability focuses on whether judicial intervention will provide an adequate remedy for a plaintiff's alleged injuries. *See Allen v. Regan*, 468 U.S. 737, 753 n.19 (1984); *Warth v. Seldin*, 422 U.S. 490, 502-06 (1975). Courts have held that this element is satisfied where, as in the instant case, a plaintiff challenges the use of census methodology. *See Carey v. Klutznick*, 637 F.2d at 838 (citizens who challenge a census undercount on the basis that improper enumeration will result in loss of funds to their city have established both an injury fairly traceable to the Census Bureau and a substantial probability that court intervention will remedy the plaintiffs' injury). Plaintiffs have satisfied this element.

IV. STATUTORY INTERPRETATION

As recognized by both Plaintiffs and Defendants, aside from the standing and ripeness issues addressed in Defendants' motion to dismiss, the present case can be resolved simply on statutory interpretation.

The interplay of the two provisions of the Census Act, Sections 141(a) and 195 must be interpreted by the Court. Section 141(a) generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition. Section 141, entitled "Population and other census information," provides:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date" in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as is necessary.

The Census Act of 1976, 13 U.S.C. § 141(a).

In plain text, Section 195 entitled "Use of Sampling" provides:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

The Census Act of 1976, 13 U.S.C. § 195.

The Supreme Court held in *Ashwander v. TVA*, "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Thus, this case can be resolved on statutory basis alone without reaching the Constitutional question.[2] Congress has

[2] The language of the Constitution that mandates a head count of the population is contained in both Constitutional provisions controlling the means of deriving the population figures for Congressional apportionment.

Section 2 of the Fourteenth Amendment states in relevant part that

spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment. Thus, the Department's decision to use statistical sampling to create the census population for congressional apportionment purposes, is not authorized by the governing statute.

The Supreme Court has been clear that "[i]t is the 'cardinal principle of statutory construction' . . . 'to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section.'" *Bennet v. Spear*, 117 S.Ct. at 1166 (quoting

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

Article I, Section 2, Clause 3 of the Constitution has the same provisions with respect to representatives, as amended by the Fourteenth Amendment mentioned above, and calls the computation of the "respective numbers" an "actual Enumeration" to be made "in such Manner as they [Congress] shall by Law direct."

The argument states that the plain language of the Constitution requires an actual head count because the meaning of the word "count" is "to number" and that an "actual Enumeration" may include statistical sampling.

However attractive deciding the Constitutional question may not [sic] be, and however correct the argument may appear, we are constrained by *Ashwander v. TVA*, 297 U.S. 288, 341, 346-47 (1936) (Brandeis, J., concurring), and do not anticipate a question of Constitutional law in advance of the necessity of deciding it. Neither do we pass upon a Constitutional question, even if properly presented by the record, if there is also present some other ground upon which the case may be disposed of. Thus, our decision is based on construing the relevant statutes, and we do not reach the Constitutional question.

United States v. Menaschem, 348 U.S. 528, 538 (1955) (stating "[t]he cardinal principle of statutory construction is to save and not to destroy")); *see United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 100 (1992). As between two statutory provision concerning the same topic, the more specific section governs the general. "The law is settled that 'however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (stating "it is a commonplace of statutory construction that the specific governs the general . . ."). Thus, the Court must determine the interplay between Section 141 and Section 195 of the Census Act in deciding whether sampling may be used in the Census 2000 to apportion representatives among the states.

Section 141 of the Census Act generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition. 13 U.S.C. § 141. A reading of the plain language of Section 141 itself further establishes that Congress' intent was to authorize sampling for numerous purposes of the census other than congressional apportionment. "As used in this section, 'census of the population' means a census of a population, housing, and matters relating to population and housing." 13 U.S.C. § 141(g).

Under 13 U.S.C. § 195, Congress' prohibition against the use of sampling is clear on its face. The statute specifically and prohibitorily states that: "*[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the*

several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." (emphasis added). The language in § 195 makes clear that the "statistical method known as 'sampling'" may not be used for determining the apportionment of Representatives of Congress. 13 U.S.C. § 195. The "except for" language thus plainly imposes a restriction forbidding the sampling method in collecting numbers for apportionment. The restriction is inseparable from the grant of authority to use sampling in other ways.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court confirmed that the "except for" language of § 2 [of the Fourteenth Amendment,] expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony." *Id.* at 43. Similarly, in *Crosby v. United States*, 506 U.S. 255 (1993), the court interpreted a statute requiring the presence of criminal defendants "except as otherwise provided" as constituting an express limitation of the circumstances where a criminal defendant could permissibly be absent. In light of the statute's "express use of the limiting phrase . . . the language and structure of the rule could not be more clear." *Id.* at 259. As such, the "except for" language of Section 195 of the Census Act could not be more clear, expressly exempting from the general authorization of that section any use of sampling for purposes of congressional apportionment.

Defendants' argument that its authority to sample is precisely the same with the "except for" language as it would be if the statute did not contain that language renders the "except for" language devoid of meaning. The Supreme Court has been clear that if possible, a

statute must be construed "in such fashion that every word has some operative effect." *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (rejecting statutory interpretation that "violated the settled rule that a statute's every word has operative effect"); *Bennet v. Spear*, 117 S. Ct. 1154, 1166 (1997) (holding principle of statutory construction is to give effect to every clause and word of a statute); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 100 (1992); *United States v. Menasche*, 348 U.S. 528, 538 (1955). Reading the general authorization for sampling in Section 141 as some how negating the prohibition of sampling for congressional apportionment in Section 195 would render the language of Section 195 meaningless. Rather, the statute must be read to give meaning to both provisions.

To the extent that Sections 141 and 195 could not be reconciled, established principles of statutory analysis require that the "except for" language in Section 195 prevail. Statutory construction governs requiring the more specific section concerning the same topic governs the general. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam) ("it is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned. . ."); *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982). Thus, where Section 195 is a specific statutory prohibition of sampling for apportionment of Congress, it prevails over the more general provisions of Section 141's grant of authority to the Secretary.

In sum, the only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes. When viewed in the context of the statute as a whole, Section 141 in no way undermines the definite prohibition of sampling for purposes of apportionment contained in Section 195. As Congress prohibited sampling for purposes of apportionment, the Secretary has no authority to do anything but an actual head count of the population for this purpose.

The conclusive reading of the statute's text on its face ends the Court's task whereas "the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *See Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating "[w]hen the words of a statute are unambiguous, [] this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished.") (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)). Because the Court finds the reading of section 141(a) and section 195 are clear on its face, the Court finds no need to reach the constitutional questions presented. Therefore, this Court finds that the defendants should be permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the

population for purposes of congressional apportionment.

An appropriate order shall issue.

Judges Widener and Jackson concur.

/s/ CLAUDE M. HILTON
CHIEF JUDGE CLAUDE M. HILTON

Alexandria, Virginia
September 24, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 98-207-A

MATTHEW GLAVIN, ET AL., PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL., DEFENDANTS

[Filed: Sept. 24, 1998]

ORDER

This matter comes before the Court on the defendants' motion to dismiss and the plaintiffs' motion for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the plaintiffs' motion for summary judgment is GRANTED, and the defendants' motion to dismiss is DENIED, and it is hereby ORDERED that the defendants are permanently enjoined from using any form of statistical sampling, including their program for non-response follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment.

/s/ CLAUDE M. HILTON
CHIEF JUDGE CLAUDE M. HILTON
UNITED STATES DISTRICT COURT

Alexandria, Virginia
September 24, 1992

APPENDIX B

Article I, Section 2, Clause 3 of the United States Constitution provides as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Section 2 of the Fourteenth Amendment to the United States Constitution provides as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legisla-

ture thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,[1] and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 2a of Title 2, United States Code, provides as follows:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of

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[1] See Amendment XIX and section 1 of amendments XXVI.

Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts

in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Section 141 of Title 13, United States Code, provides as follows:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan sub-

mitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If–

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census–

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

Section 195 of Title 13, United States Code, provides as follows:

Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Section 209 of the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2480-2483 (1997), provides as follows:

(a) Congress finds that–

(1) it is the constitutional duty of the Congress to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States;

(2) the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States;

(3) section 2 of the 14th article of amendment to the Constitution clearly states that Representatives are to be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State";

(4) article I, section 2, clause 3 of the Constitution clearly requires an "actual Enumeration" of the population, and section 195 of title 13, United States Code, clearly provides "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.";

(5) the decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs;

(6) it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States;

(7) the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census;

(8) the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted; and

(9) Congress is committed to providing the level of funding that is required to perform the entire range of constitutional census activities, with a particular emphasis on accurately enumerating all individuals who have historically been undercounted, and toward this end, Congress expects–

(A) aggressive and innovative promotion and outreach campaigns in hard-to-count communities;

(B) the hiring of enumerators from within those communities;

(C) continued cooperation with local government on address list development; and

(D) maximized census employment opportunities for individuals seeking to make the transition from welfare to work.

(b) Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to deter-

mine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

(c) For purposes of this section–

(1) the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census; and

(2) the report ordered by title VIII of Public Law 105–18 and the Census 2000 Operational Plan shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding.

(d) For purposes of this section, an aggrieved person (described in subsection (b)) includes–

(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action;

(2) any Representative or Senator in Congress; and

(3) either House of Congress,

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with Section 2284 of title 28, United States Code. The chief judge of the United

States court of appeals for each circuit shall, to the extent practicable and consistent with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

(2) It shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter.

(f) Any agency or entity within the executive branch having authority with respect to the carrying out of a decennial census may in a civil action obtain a declaratory judgment respecting whether or not the use of a statistical method, in connection with such census, to determine the population for the purposes of the apportionment or redistricting of Members in Con-

gress is forbidden by the Constitution and laws of the United States.

(g) The Speaker of the House of Representatives or the Speaker's designee or designees may commence or join in a civil action, for and on behalf of the House of Representatives, under any applicable law, to prevent the use of any statistical method, in connection with the decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress. It shall be the duty of the Office of the General Counsel of the House of Representatives to represent the House in such civil action, according to the directions of the Speaker. The Office of the General Counsel of the House of Representatives may employ the services of outside counsel and other experts for this purpose.

(h) For purposes of this section and section 210–

(1) the term "statistical method" means an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference; and

(2) the term "census" or "decennial census" means a decennial enumeration of the population.

(i) Nothing in this Act shall be construed to authorize the use of any statistical method, in connection with a decennial census, for the apportionment or redistricting of Members in Congress.

(j) Sufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census to

plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible. In both the 2000 decennial census, and any dress rehearsal or other simulation made in preparation for the 2000 decennial census, the number of persons enumerated without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for: (1) all data releases before January 1, 2001; (2) the data contained in the 2000 decennial census Public Law 94-171 data file released for use in redistricting; (3) the Summary Tabulation File One (STF-1) for the 2000 decennial census; and (4) the official populations of the States transmitted from the Secretary of Commerce through the President to the Clerk of the House used to reapportion the districts of the House among the States as a result of the 2000 decennial census. Simultaneously with any other release or reporting of any of the information described in the preceding sentence through other means, such information shall be made available to the public on the Internet. These files of the Bureau of the Census shall be available concurrently to the release of the original files to the same recipients, on identical media, and at a comparable price. They shall contain the number of persons enumerated without using statistical methods and any additions or subtractions thereto. These files shall be based on data gathered and generated by the Bureau of the Census in its official capacity.

(k) This section shall apply in fiscal year 1998 and succeeding fiscal years.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 98-207-A

MATTHEW GLAVIN, ET AL., PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL., DEFENDANTS

[Filed: Sept. 25, 1998]

NOTICE OF APPEAL

Pursuant to Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, P.L. No. 105-119, 111 Stat. 2482 (1997), codified at 13 U.S.C. § 141 note, defendants William J. Clinton, in his capacity as President of the United States; the United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census hereby appeal to the United States Supreme Court from the Order and Judgment and Memorandum Opinion filed by this Court on September 24, 1998.

Respectfully submitted,

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Assistant Attorney General

HELEN F. FAHEY
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/s/ DENNIS E. SZYBALA
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2 1998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-500

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOINT MOTION TO EXPEDITE CONSIDERATION OF JURISDICTIONAL STATEMENT, TO ESTABLISH EXPEDITED SCHEDULE FOR BRIEFING AND ARGUMENT IF PROBABLE JURISDICTION IS NOTED, AND TO CONSOLIDATE THIS CASE WITH NO. 98-404 FOR PURPOSES OF ORAL ARGUMENT

The district court in this case has held that the Commerce Department's plan to employ statistical sampling in conducting the decennial census for the year 2000 would violate the Census Act. The jurisdiction of the district court was invoked under Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, 111 Stat. 2482. Section 209(e)(1) also provides that "[a]ny final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States." 111 Stat. 2482. A notice of appeal to this Court was filed on September 25, 1998.

4 pp

The Solicitor General, on behalf of the defendants in this case, is filing a jurisdictional statement together with this motion. Appellees agree that probable jurisdiction should be noted and do not plan to file a separate response to the jurisdictional statement.

On September 10, 1998, this Court noted probable jurisdiction in United States Department of Commerce, et al. v. United States House of Representatives, et al., No. 98-404. That case also involves a suit brought under Section 209(e)(1) of the 1998 Appropriations Act challenging the Commerce Department's plan for the 2000 census. The Court established the following expedited schedule for briefing and argument: briefs for the appellants and the intervenor-defendants to be filed and served by 3 p.m. on October 6, 1998; brief for appellee United States House of Representatives to be filed and served by 3 p.m. on November 3, 1998; reply briefs, if any, to be filed and served by 3 p.m. on November 17, 1998; and oral argument to be held on November 30, 1998.

The instant case involves essentially the same statutory and constitutional challenges to the Commerce Department's plan as does the suit brought by the House of Representatives. The district court in each of the two cases concluded that the plan violates 13 U.S.C. 195 and is therefore invalid. If it were undisputed that the suit brought by the House of Representatives is justiciable,

the Court might simply choose to hold the jurisdictional statement in the instant case pending its disposition of No. 98-404.

As the jurisdictional statement in No. 98-404 explains (at 13-15), however, the appellants in that case contend that the suit filed by the House of Representatives does not satisfy the requirements of Article III. Although the standing of the appellees in the instant case is also contested, the jurisdictional issues presented by the two cases are quite distinct. Because appellees take the position that the Court can reach the merits of the challenge to the Census Bureau's plan for the 2000 census in this case even if it cannot do so in No. 98-404, we respectfully move that the Court note probable jurisdiction in this case and consolidate it for oral argument with No. 98-404.

Accordingly, defendant-appellants William Jefferson Clinton, et al., and plaintiff-appellees Matthew Glavin, et al.,[1] respectfully propose that the Court adopt the following expedited schedule for briefing and argument: opening brief for the

---

[1] Four groups of litigants -- Richard A. Gephardt, et al.; the Legislature of the State of California, et al.; the City of Los Angeles, et al.; and the National Korean American Service & Education Consortium, Inc., et al. -- moved for leave to intervene as defendants in the district court. The district court did not rule on the motions to intervene. Although the court's opinion is not entirely clear on this point, the list of defendants included at the beginning of the opinion (see J.S. App. 1a) indicates that the district court did not regard the putative intervenors as parties to the case. But see id. at 2a ("Now before the Court are the defendants' and intervenor-defendants' motions to dismiss the plaintiffs' complaint").

appellants to be filed and served on October 20, 1998; appellees' brief to be filed and served on November 4, 1998 (one day after the appellee House of Representatives' brief is due in No. 98-404); reply brief for the appellants to be filed and served on November 17, 1998 (the same day on which the reply brief is due in No. 98-404); and oral argument to be held on November 30, 1998.

Respectfully submitted.

Seth P Waxman/cs

MICHAEL A. CARVIN
Counsel for Appellees

SETH P. WAXMAN
Solicitor General

OCTOBER 1998

(3)

Supreme Court, U.S.
FILED
OCT 19 1998

No. 98-564

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED: SEPTEMBER 25, 1998
PROBABLE JURISDICTION NOTED: OCTOBER 9, 1998

137 pp

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Docket No. 98-Cv-207

GLAVIN, ET AL.

v.

BARR

DOCKET ENTRIES

DATE		PROCEEDINGS
1998		
2/12	1	COMPLAINT Filing Fee $150.00 Receipt # 100 119267 (lleb) [Entry date 02/13/98] [Edit date 03/02/98]
		* * * * *
2/12	2	MOTION by plaintiffs for Convening a Three-Judge Court (ltun) [Entry date 02/17/98]
		* * * * *
3/27	11	MOTION to Intervene pursuant to Rule 24(a)(b) by Richard A. Gephardt, Danny K. Davis, Juanita Millender-McDonald, Lucille Roybal-Allard, Louise M. Slaughter, and Bennie G. Thompson (will notice) (klau) [Entry date 03/31/98]
		* * * * *

4/1	19	MOTION to Intervene as defts by Legislature of the, The Californi a Senate, John Burton, The California Assembly, Antonio Villaraigosa (bsha) [Entry date 04/07/98]

* * * * *

4/3	15	MOTION by movants to Intervene by City of Los Angeles, City of New York, Ne, County of Los Angeles, City of Chicago, Ill, City and County of S, Miami-Dade County, F, City of Inglewood, C, City of Houston, Tex, City of San Antonio, City and County of D, City of Long Beach, City of San Jose, Ca, City of Stamford, Co, City of Oakland, Cal, City of Cudahy, Cali, County of Santa Clar, County of San Bernar, County of Alameda, C, County of Riverside, State of New Mexico, U.S. Conference of M, League of Women Vote, Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Gutierrez, Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, John Conyers Jr. (will notice) (sent to CHM) (klau) [Edit date 04/03/98]

* * * * *

4/6	26	MOTION by United States Dep, James F. Holmes, Bureau of the Census,

William M. Daley, William J. Clinton to Dismiss (will notice) (klau) [Entry date 04/07/98]

* * * * *

4/6	29	MOTION by plaintiffs for Summary Judgment (will notice)(klau) [Entry date 04/07/98]

* * * * *

4/13	39	MOTION to Intervene by National-Korean American Service & Education Consortium Inc., Et al as defts (bsha) [Entry date 04/14/98]

* * * * *

5/1	57	MOTION by plaintiffs for Leave to Amend Complaint (klau) [Entry date 05/04/98]

* * * * *

5/4	67	MEMORANDUM by Matthew Glavin, Gary A. Hofmeister, Stephen Gons, James F. Mclaughlin, David H. Glavin, Deborah Hardman, Craig Martin, Jim Lacy, Judy Cresenta, Helen V. England, Amie S. Carter, Robert Richard Dennik, Michael T. James, William J. Byrn, Robert Barr, Cobb County Georgia, John Taylor in opposition to [26-1] motion by United States Dep, James F. Holmes, Bureau of the Census, William M. Daley, William J. Clinton to Dismiss (klau) [Entry date 05/05/98]

5/4	68	AFFIDAVIT of Dr. Ronald E. Weber by plaintiffs Re: [67-1] opposition memorandum by plaintiffs (Klau) [Entry date 05/05/98]

* * * * *

5/7	85	MOTION by plaintiffs and Bucks County, Pennsylvania for Leave to (Second) Amended Complaint (klau) [Entry date 05/08/98]

* * * * *

5/14	91	MOTION by United States Dep, James F. Holmes, Bureau of the Census, William M. Daley, William J. Clinton to Dismiss Plaintiffs' Second Amended Complaint (klau) [Entry date 05/15/98]

* * * * *

6/10	110	ORDERED that the defendants' motion to dismiss, the plaintiffs' motion for summary judgment, motions to intervene, and motions for leave to file Amicus Curiae briefs in this matter shall be heard at 10 o'clock in the morning on August 7, 1998 in the United States District Courthouse, Poff Federal Building, 210 Franklin Road, South West, Roanoke, Virginia - ent. & filed (signed by Judge Claude M. Hilton) Copies Mailed: yes (klau) [Entry date 06/11/98]

* * * * *

9/24	126	MEMORANDUM OPINION (signed by Judge Claude M. Hilton) Copies Mailed: y (rwar) [Entry date 09/25/98]
9/24	127	ORDER in accordance with the accompanying Memorandum Opinion denying [91-1] motion by United States Dep, James F. Holmes, Bureau of the Census, William M. Daley, William J. Clinton to Dismiss Plaintiffs' Second Amended Complaint. Pltfs' motion for summary judgment is granted. ORDERED that the defts. are permanently enjoined from using any from of statistical sampling, including their program for non-responsive follow-up and Integrated Coverage Measurement to determine the population for purposes of congressional apportionment. (signed by Judge Claude M. Hilton) Copies Mailed: y (rwar) [Entry date 09/25/98]
9/24	—	CASE assigned to Judge Claude M. Hilton (rwar) [Entry date 09/25/98]
9/24	—	Case closed (rwar) [Entry date 09/25/98]
9/25	128	NOTICE OF APPEAL OF Order and Judgment and Memorandum Opinion by William J. Clinton, William M. Daley, Bureau of the Census, James F. Holmes, United States Dep. Copy of Notice, Order, Mem. Opn. and Docket Entries mailed to U.S. Supreme Court,

Washington, D.C. (psho) [Entry date 09/28/98]

9/25 129 ORDERED that corrections be made in the Memorandum Opinion dated 9/24/98, in the above styled case as follows: Page 22, footnote #2, eleventh line from the bottom of the page, include the word "not" after "may" and should read . . . that an actual Enumeration may not include statistical sampling. (signed by Judge Claude M. Hilton) Copies Mailed: y (rwar) [Entry date 09/29/98]

* * * * *

9/28 130 TRANSCRIPT for dates of 8/7/98 (CMH, RAJ, HEW)-filed (klau) [Entry date 09/29/98]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action File No. 98-207-A

MATTHEW GLAVIN,
A RESIDENT OF THE STATE OF GEORGIA;
ROBERT BARR,
INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES;
GARY A. HOFMEISTER,
A RESIDENT OF THE STATE OF INDIANA;
STEPHEN GONS,
A RESIDENT OF THE STATE OF PENNSYLVANIA;
JAMES F. MCLAUGHLIN,
A RESIDENT OF THE STATE OF NEW JERSEY;
DAVID H. GLAVIN, A RESIDENT OF THE STATE OF OHIO;
JOHN TAYLOR,
A RESIDENT OF THE COMMONWEALTH OF VIRGINIA;
DEBORAH HARDMAN,
A RESIDENT OF THE STATE OF FLORIDA;
CRAIG MARTIN,
A RESIDENT OF THE STATE OF CONNECTICUT;
JIM LACY, A RESIDENT OF THE STATE OF CALIFORNIA;
JUDY CRESANTA,
A RESIDENT OF THE STATE OF NEVADA;
HELEN V. ENGLAND,
A RESIDENT OF THE STATE OF ARIZONA;
AMIE S. CARTER,
A RESIDENT OF THE STATE OF MONTANA;
ROBERT RICHARD DENNIK,
A RESIDENT OF THE STATE OF WISCONSIN;
MICHAEL T. JAMES,
A RESIDENT OF THE STATE OF ILLINOIS;

WILLIAM J. BYRN, A RESIDENT OF THE STATE OF GEORGIA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COBB COUNTY COMMISSION CHAIRMAN AND COBB COUNTY, GEORGIA, PLAINTIFFS

v.

WILLIAM J. CLINTON, IN HIS CAPACITY AS PRESIDENT OF THE UNITED STATES; THE UNITED STATES DEPARTMENT OF COMMERCE; WILLIAM M. DALEY, IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF COMMERCE; BUREAU OF THE CENSUS, AN AGENCY WITHIN THE UNITED STATES DEPARTMENT OF COMMERCE; AND JAMES F. HOLMES, IN HIS CAPACITY AS ACTING DIRECTOR OF THE BUREAU OF THE CENSUS, DEFENDANTS

[Filed Feb. 12, 1998]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW Plaintiffs Matthew Glavin, a resident of the State of Georgia; Robert Barr, individually, and in his capacity as a member of the United States House of Representatives; Gary A. Hofmeister, a resident of the State of Indiana; Stephen Gons, a resident of the Commonwealth of Pennsylvania; James F. McLaughlin, a resident of the State of New Jersey; David H. Glavin, a resident of the State of Ohio; John Taylor, a resident of the Commonwealth of Virginia; Deborah Hardman, a resident of the State of Florida; Craig Martin, a resident of the State of Connecticut; Jim Lacy, a resident of the State of California; Judy Cresanta, a resident of the

State of Nevada; Helen V. England, a resident of the State of Arizona; Amie S. Carter, a resident of the State of Montana; Robert Richard Dennik, a resident of the State of Wisconsin; Michael T. James, a resident of the State of Illinois; William J. Byrn, a resident of the State of Georgia, individually and in his official capacity as Cobb County Commission Chairman (hereinafter collectively referred to as " individual Plaintiffs" or "Plaintiffs"); Cobb County, Georgia; Bucks County, Pennsylvania; Delaware County, Pennsylvania; and DuPage County, Illinois (the "County Plaintiffs") and hereby make and file this their Complaint for Declaratory Judgment and Injunctive Relief against Defendants William J. Clinton, in his capacity as President of the United States; the United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census, an agency within the United States Department of Commerce; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census (hereinafter collectively referred to as the "Defendants") as follows:

PARTIES

1. Plaintiff Matthew Glavin is a voter of the State of Georgia and Forsyth County, residing in the 9th Congressional District, the 48th State Senate District, and the 85th State House District. Mr. Glavin is a registered voter and will vote in the 2002 elections.

2. Plaintiff Robert Barr is a sitting member of the House of Representatives of the United States, representing the Seventh District of the State of Georgia, who intends to seek reelection for such office and to vote in such election. Representative Barr resides in

Cobb County and votes in the 32nd State Senate District and 29th State House District.

3. Plaintiff Gary A. Hofmeister is a voter of the State of Indiana and Marion County, residing in the 10th Congressional District, the 30th State Senate District and the 87th State House District. Mr. Hofmeister is a registered voter and will vote in the 2002 elections.

4. Plaintiff Stephen Gons is a voter of the State of Pennsylvania and Cumberland County, residing in the 19th Congressional District, the 31st State Senate District and the 88th State House District. Mr. Gons is a registered voter and will vote in the 2002 elections.

5. Plaintiff James F. McLaughlin is a voter of the State of New Jersey and Bergen County, residing in the 5th Congressional District, the 39th State Senate District, and the 39th State House District. Mr. McLaughlin is a registered voter and will vote in the 2002 elections.

6. Plaintiff David H. Glavin is a voter of the State of Ohio and Cuyahoga County, residing in the 19th Congressional District, the 22nd State Senate District and the 15th State House District. Mr. Glavin is a registered voter and will vote in the 2002 elections.

7. John Taylor is a voter in the Commonwealth of Virginia and Loudoun County, residing in the 10th Congressional District, the 33rd State Senate District and the 32nd State House District. Mr. Taylor is a registered voter and will vote in the 2002 elections.

8. Deborah Hardman is a voter in the State of Florida and St. Johns County, residing in the 4th Congressional District, the 8th State Senate District and the 18th State House District. Ms. Hardman is a registered voter and will vote in the 2002 elections.

9. Craig Martin is a voter in the State of Connecticut and New Haven County, residing in the 5th Congressional District, the 16th State Senate District, and the 73rd State House District. Mr. Martin is a registered voter and will vote in the 2002 elections.

10. Jim Lacy is a voter in the State of California and Orange County, residing in the 47th Congressional District, the 38th State Senate District and the 73rd State House District. Mr. Lacy is a registered voter and will vote in the 2002 elections.

11. Judy Cresanta is a voter in the State of Nevada and Washoe County, residing in the 2nd Congressional District, the 3rd State Senate District and the 25th State House District. Ms. Cresanta is a registered voter and will vote in the 2002 elections.

12. William J. Byrn is a voter in the State of Georgia and Cobb County, residing in the 7th Congressional District, the 37th State Senate District and the 34th State House District. Mr. Byrn is also the Cobb County Commission Chairman. Mr. Byrn is a registered voter and will vote in the 2002 elections.

13. Helen V. England is a voter in the State of Arizona and Maricopa County, residing in the 3rd Congressional District, the 17th State Senate District and the 17th State House District. Ms. England is a registered voter and will vote in the 2002 elections.

14. Amie S. Carter is a voter in the State of Montana and Gallatin County, residing in an at-large Congressional District, the 14th State Senate District and the 27th State House District. Ms. Carter is a registered voter and will vote in the 2002 elections.

15. Michael T. James is a voter in the State of Illinois and LaSalle County, residing in the 11th Con-

gressional District, the 38th State Senate District and the 76th State House District. Mr. James is a registered voter and will vote in the 2002 elections.

16. Robert Richard Dennik is a voter in the State of Wisconsin and Milwaukee County, residing in the 5th Congressional District, the 5th State Senate District and the 14th State House District. Mr. Dennik is a registered voter and will vote in the 2002 elections.

17. Cobb County is located in the State of Georgia and receives federal funds that are allocated on the basis of the results of the census.

18. Defendant William J. Clinton is President of the United States and is being sued in his capacity as such. Defendant Clinton may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

19. Defendant United States Department of Commerce is a department within the executive branch of the government of the United States of America and an "agency" within the meaning of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701, *et seq.* Defendant Commerce Department may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

20. Defendant William M. Daley is the Secretary of Commerce, and he is being sued in his capacity as such. Defendant Daley may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

21. Defendant Bureau of the Census is an agency within the Commerce Department, and is an "agency" within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* (the "APA"). Defendant

Census Bureau may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

22. Defendant James F. Holmes is the Acting Director of the Census Bureau and is being sued in his capacity as such. Defendant Holmes may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

JURISDICTION AND VENUE

23. This civil action is a case of actual controversy between Plaintiffs and Defendants which arises under the Constitution of the United States and a federal statute and may be finally adjudicated as between the parties. The rights here sought to be redressed are rights guaranteed by Article I, § 2, cl.3; the First and Fourteenth Amendments to the United States Constitution; 2 U.S.C. § 2a; the Census Act of 1976, 13 U.S.C. § 1 *et seq.*

24. Congress has specifically granted this Court jurisdiction over this case pursuant to the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act, 1998, P.L. 105-119 (November 26, 1997) (the "1998 Appropriations Act").

25. Jurisdiction is also conferred upon this Court by 28 U.S.C. §§ 1331 and 1343(a)(4). A declaration of rights is sought pursuant to 28 U.S.C. §§ 2201, 2202 and the 1998 Appropriations Act, P.L. 105-119, § 209(b).

26. Plaintiffs are entitled to have this case heard and decided by a three judge panel pursuant to the 1998 Appropriations Act, P.L. 105-119, § 209(e)(1) and 28 U.S.C. § 2284 because this case challenges the constitutionality of the method by which the Commerce Department and its agency, the Census Bureau, will determine

the population of the United States for purposes of apportioning representation among the several States. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(3) as plaintiff John Taylor resides in this judicial district and "no real property is involved in the action."

STATEMENT OF FACTS

THE LEGAL FRAMEWORK OF THE CENSUS

27. The United States Constitution requires that congressional "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . ." U.S. Const., Amend. XIV, § 2; Art. I, § 2, cl. 3.

28. The Department of Commerce and its agency, the Bureau of the Census (collectively referred to as the "Department"), have been charged by Congress with the duty to conduct a decennial census in such manner as Congress "shall by Law direct" and in accord with the language and purpose of the Constitution. U.S. Const. Art. I, § 2, cl. 3; Census Act of 1976, 13 U.S.C. § 21.

29. Following each decennial census, the President of the United States is required to transmit to Congress "a statement showing the whole number of persons in each State" and "the number of Representatives to which each State would be entitled" under a lawful apportionment on the first day, or within one week, of the first regular session of Congress. 2 U.S.C. § 2a(a).

30. The Clerk of the House of Representatives is required to transmit to the executive of each State "a certificate of the number of Representatives to which

[each] State is entitled," within fifteen days of receipt of the apportionment statement from the President, based on the apportionment of the population derived from the decennial census. 2 U.S.C. § 2b.

31. After receiving the apportionment certification from the Clerk of the House, the States are required to establish congressional districts equal to the number of Representatives to which each State is entitled and "Representatives shall be elected only from districts so established." 2 U.S.C. § 2c.

32. The decennial census is the foundation of representative government under the Constitution because it provides the basis for apportionment of the number of congressional Representatives to which each State is entitled and the number of Electors from each State who, representing the people, elect the President of the United States. U.S. Const., Art. I, § 2, cl. 2; Art. II; 2 U.S.C. §§ 2c, 3.

33. The census also plays an important role in intrastrate redistricting because "State and local governments use census data to draw legislative districts of equal population to comply the with constitutional 'one man, one vote' mandate." REPORT TO CONGRESS – THE PLAN FOR CENSUS 2000, July 1997, as revised and reissued in August 1997, (the "Riche Report") at 1. In fact, many state constitutions and statutes require the state to utilize the federal census in conducting their redistricting. Arizona, California, Connecticut, Florida, Georgia, Indiana, Montana, Nevada, New Jersey, Ohio, Pennsylvania, Virginia, and Wisconsin have such a requirement.

34. The census also has important ramifications for state and local governments and their residents be-

cause census data are used "to determine allocation formulas for the distribution of billions of dollars of federal and state funds each year." Riche Report at ix.

35. The Constitution prohibits the intentional omission of any person from the decennial census by mandating that Congress, through the Department, conduct an "actual Enumeration" and engage in "counting the whole number of persons in each State" to implement the constitutional scheme of representative government, as envisioned by the Framers. U.S. Const., Art. I, § 2, cl. 3; XIV Amend. For similar reasons, it prohibits the decennial census' population figures to be based on a statistical estimate or anything other than an actual counting of real persons.

36. Pursuant to the Census Act of 1976 (the "Census Act"), Congress has also expressly prohibited the Department from using the statistical method known as "sampling" in conducting the decennial census for determining the population for purposes of apportionment of Representatives among the several States. Census Act of 1976, 13 U.S.C. § 195.

37. On June 5, 1997, Congress enacted the Supplemental Appropriations and Rescissions Act (the "Supplemental Appropriations Act") H.R. Cong. Report No. 119, 105th Congress, 1st Session, June 4, 1997, which, in relevant part, prohibited the Department from utilizing any funds "to plan or otherwise prepare for the use of sampling or any other statistical procedure, including statistical adjustment in any determination of population for purposes of the apportionment of Representatives in Congress among the several States."

38. On June 9, 1997, Defendant Clinton vetoed the Supplemental Appropriations Act based on his opinion

that "the Constitution and relevant statutes permit the use of sampling in the decennial census." Message of Cancellation, 1997 WL 307949.

39. In November of 1997, Congress appropriated funding for the Commerce Department, including funds for conducting the 2000 Census, finding that "the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." 1998 Appropriations Act, P.L. 105-119, § 209(a)(2).

The Department's Plan For Statistical Sampling and Adjustment

40. Every census since the founding of the Republic has attempted to count each person. Each such census has actually enumerated the number of people. In other words, the number of persons has always been determined by means of an actual head count.

41. Given the inherent difficulties of actually enumerating the population, each census has unintentionally failed to count some people.

42. For the first time in the Nation's history, the federal government has decided that it will intentionally fail to count at least 10 percent of the population. Thus, at least 26 million Americans will be deliberately omitted from the census if the Plan for Census 2000 is implemented. In addition, population figures produced pursuant to the Plan will not represent the sum of the omitted 10% and the 90% sought to be counted, but will be further adjusted upward based on estimates derived from statistical sampling and inference.

43. Congress enacted the 1997 Emergency Supplemental Appropriations Act for Recovery from Natural

Disasters ("1997 Disaster Relief Bill") which, in relevant part, required the Department to provide Congress with a written report containing a statement of the methodologies to be used in the conduct of the 2000 Census.

44. As required by the 1997 Disaster Relief Bill, the Department issued the Riche Report which commits the Department to using statistical sampling in lieu of an actual enumeration for calculating the population in the 2000 Census.

45. In July of 1997, the Department published its *Census 2000 Operational Plan* (the "Plan"), further confirming its intent to substitute statistical sampling for actual enumeration in the 2000 Census. The Plan further confirms that the Department will deliberately omit approximately 26 million people (ten percent of the population) from its actual count.

46. The Department has specified that it will use the following methodology in conducting the 2000 Census: First, the Department will send questionnaires to households identified on its Master Address List. Second, the Department will conduct a non-response follow-up for some of those households which did not respond to the questionnaires. "The nonresponse follow-up operation in Census 2000 will incorporate the use of sampling to yield a 90 percent completion rate at the census tract level." Riche Report at 18. Once the Department has attempted to count 90 percent of the population, no further effort will be made to count the missing persons. The Department will use statistical sampling to add computer-generated population numbers to compensate for the intentional undercount of 10% of all housing units. This estimate of virtual persons will be modeled after the composition of those persons who were counted only as a result of the follow-up efforts. Thus, these fictional persons will not reflect the overall demographic composition of all the persons that were actually counted in that area.

47. After using sampling to achieve a statistical estimation of 100% of the population, the Department will further manipulate the population estimate by an additional statistical methodology known as integrated coverage management ("ICM"). ICM relies upon dual system estimation ("DSE") pursuant to which the Department will carefully count the actual number of people in a limited number of areas, a sample of 25,000 census blocks out of 7 million nationwide. Riche Report at 30. The Department will then compare the results of this careful head count to the numbers derived from the direct responses of the counting phase. It will then infer that demographic deviations from the initial calculation will occur throughout the rest of the state in question for each particular strata that is measured. "These strata will be based on the characteristics of each block in the 1990 census, such as the block's state, racial and ethnic status, and proportion of homeowners to renters." Riche Report at 30.

48. According to the Department, "Compared to the undercount rate for non-Hispanic Whites, the 1990 undercount rates were six times larger among African Americans and seven times larger among Hispanics." Riche Report at 4. Thus, the computer-generated persons created by the Department will include a disproportionately high number of these minority groups. Any adjustments based on this methodology will have the effect of increasing the relative population of areas with a disproportionately large number of minorities under a virtual census as compared to an actual head

count and decreasing the relative population of areas with a disproportionately fewer number of minorities.

49. The post-enumeration survey ("PES") conducted by the Department after the 1990 census also utilized DSE. The Department has based its simulations of the 2000 census on the premise "that the percentage undercounts (and overcounts) measured for each group in the 1990 PES also would apply in Census 2000." Riche Report at 45.

50. In short, the census will utilize statistical sampling in at least three ways: 1) to conduct non-response follow-up and thus to arrive at an estimation of 90 percent of the population; 2) to model that number to an estimation of 100 percent of the population; 3) to adjust that estimate to take into account demographic deviations that are discovered through the process of ICM.

51. Congress has found that "the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted." 1998 Appropriations Act, P.L. 105-119, § 209(a)(8).

52. Federal law requires the Secretary of Commerce to report a tabulation of the total population by States to the President by January 1, 2001, and in turn requires the President to "transmit to the Congress a statement showing the whole number of persons in each state" by January 8, 2001. 13 U.S.C. § 141(b); 2 U.S.C. § 2a. In light of the significant practical difficulties of conducting an actual head count of the population, the

Defendants will not be able to conduct an actual head count by January 1, 2001, unless they begin this process in 1999 at the latest. Thus, absent judicial intervention in the immediate future, the Defendants cannot provide lawful or constitutional census figures by January 1, 2001, the date required by statute and the Constitution. Moreover, if the Department is required to conduct an actual head count at any time after January 1, 2001 it will be unable to complete an actual head count in time to provide the Congress and the states with the census data they need to create equally populated congressional districts for the 2002 elections. Thus, if the legality and constitutionality of the Department's Census Plan is not resolved in the immediate future, it will not be possible to use an actual head count, or any lawful or constitutional census, as apportionment or redistricting figures for the 2002 elections or other legally mandated purposes.

53. The 1998 Appropriations Act provides that "the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census." 1998 Appropriations Act, P.L. 105-119, § 209(c)(1).

54. The Riche Report, ordered by Congress in title VIII of Public Law 105-118, and the Census 2000 Operational Plan, have been deemed by Congress to be sufficiently concrete and final so as to constitute final agency action regarding the use of statistical methods in the 2000 decennial census. 1998 Appropriations Act, P.L. 105-119, § 209(c)(2).

55. On April 1, 1998, the Department will commence the 2000 Census by conducting the "Census 2000 Dress Rehearsal" to perform operational testing of procedures and systems to be used in the 2000 Census. Census 2000 Operational Plan at XIII-3.

56. The 2000 Census commences with the Dress Rehearsal, which implements the Department's plan to eliminate the actual head count performed in every other census and, instead, to use a partial head count and to use statistical methodology to add to or subtract from the number of persons counted in the partial head count.

PLAINTIFFS' INJURIES

57. Congress has provided by law that "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." 1998 Appropriations Act, P.L. 105-119, § 209(b).

58. Pursuant to § 209(d) of the 1998 Appropriations Act, an "aggrieved person" entitled to seek relief under the statute "includes:1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action; 2) any Representative or Senator in Congress; and 3) either House of Congress."

59. Plaintiffs are aggrieved persons within the meaning of the Appropriations Act and will suffer several discrete, concrete injuries as a result of the Defendants' failure to conduct an actual head count aimed at enumerating the entire population, as the Constitution and the Census Act require.

60. The individual Plaintiffs will suffer vote dilution and a loss of relative political representation as a result of the Defendants' Plan. As residents of areas that will receive a disproportionately low amount of population under the statistical methodology employed by the Plan, the individual Plaintiffs will have less relative population and voting strength than they would have enjoyed if the census were conducted on the basis of an actual head count. Specifically, the relative political representation and voting strength of their districts will be artificially diminished because these districts will be awarded a disproportionately low number of computer-generated persons.

61. This vote dilution will occur both at the intrastate and interstate level. Within the individual Plaintiffs' states, these Plaintiffs will suffer a decrease in their relative voting strength as representatives are subtracted and their district's or county's political strength is artificially diminished as a result of the Defendants' statistical sampling and adjustment. Plaintiffs residing in Maricopa, Bergen, Washoe, Orange, Cobb, St. Johns, and Gallatin Counties will suffer a dilution in their voting strength because sampling will decrease the political representation and strength of these counties within their states. The individual Plaintiffs residing in Cumberland County, Pennsylvania, and LaSalle County, Illinois, will suffer a decrease in their voting strength because the Department will actually subtract population from the actual headcount conducted there. Similarly, individual Plaintiffs' political representation in Congress will be adversely affected.

There is a substantial likelihood and probability that at least one of the Plaintiffs residing in Indiana, Wisconsin, Pennsylvania, Illinois or Ohio will lose, or fail to gain, a seat in the House of Representatives as a direct result of the Department's sampling Plan.

62. But for the Defendants' decision to substitute statistical sampling for an actual enumeration of the population, the individual Plaintiffs residing in Maricopa, Bergen, Orange, Washoe, St. Johns, Cobb, Gallatin, and Cumberland Counties would live in districts with more political representation and districts and counties that would receive more federal funding.

63. The Congressional representation, or district, of all of the Plaintiffs could be changed as a result of the use of Defendants' statistical methodology.

64. If the Department fails to conduct an actual head count, there will be no valid census which state governments may use to redistrict for the 2002 federal and state elections. If the Department is allowed to conduct a virtual census and it is subsequently invalidated, the Department will not be able to conduct an actual head count in time to provide the Congress and the States with census figures in time for them to redistrict by the 2002 elections. Plaintiffs' fundamental rights to representation based on a timely apportionment of their federal and state districts, to equal representation and to vote will be irreparably injured if the 2002 elections are delayed and/or conducted in districts based on an unlawful 2000 census or the 1990 census figures.

65. Several of the individual Plaintiffs live in districts whose population has increased significantly since 1990. At the interstate level, several of the individual Plaintiffs reside in Georgia, which is virtually certain to

gain an extra seat in Congress after the next decennial census is conducted, regardless of whether sampling or an actual headcount is pursued. At the intrastate level, several of the individual Plaintiffs reside in Forsyth County, Georgia, Cobb County, Georgia, Loudoun County, Virginia, and St. Johns County, Florida, whose population has grown significantly during the 1990's. These Plaintiffs will suffer an irreparable loss of their share of political representation both in Congress and in state legislatures as a direct consequence of the Defendants' failure to conduct a lawful and constitutional census and apportionment.

66. Since the State of Georgia will be unable to redistrict based on a legally constitutionally valid apportionment, Plaintiff Robert Barr will be unable to take his seat as a member of the House of Representatives in a timely and orderly manner and his constituents' constitutional right to petition the government will be adversely affected.

67. The County Plaintiff currently receive funds from a variety of federal programs that are statutorily required or authorized to allocate their resources on the basis of the census. If the Department's Plan is implemented, it will determine the level of funding that the County Plaintiff receives. The County Plaintiff will be adversely affected by the Department's Plan because this plaintiff will be awarded a disproportionately small number of computer generated population as compared to its neighbors. As a result, this plaintiffs will receive less federal funding than it would if the census were lawfully conducted on the basis of an actual head count.

68. Alternatively, if the Department's Plan were implemented and then invalidated, the County Plaintiff would be injured by the resulting delay in completing a

constitutional census. The population in this county has increased at a disproportionately high rate since 1990, and thus this county will be entitled to an increase in federal funding that is allocated on the basis of the census. A delay in the completion of a constitutional census directly inflicts financial injury on the County Plaintiff.

69. The Plaintiffs have no adequate remedy at law.

COUNT I

70. Plaintiffs repeat and reallege each allegation contained in paragraph 1 through 69 and incorporate them herein by reference.

71. Congress has delegated to the Department the duty to conduct the decennial census in such manner as Congress "shall by Law direct." U.S. Const. Art. I, § 2, cl. 3; Census Act of 1976, 13 U.S.C. § 21.

72. Through the Census Act, Congress has directed the Department not to use statistical sampling "for the determination of population for purposes of apportionment of Representatives in Congress among the several States." The Census Act of 1976, 13 U.S.C. § 195; *see also* 13 U.S.C. § 141(e)(2).

73. The Defendants will use statistical sampling, in place of an actual count of the population, for the 2000 Census for the purposes of apportionment. The Defendants' use of statistical sampling violates Section 195 of the 1976 Census Act.

COUNT II

74. Plaintiffs repeat and reallege each allegation contained in paragraph 1 through 73 and incorporate them herein by reference.

75. Article I, Section 2 of the Constitution requires that the census shall be made on the basis of an "actual Enumeration" every ten years. U.S. Const., Art. I., § 2, cl. 3. The Defendants' decision to deliberately fail to count at least 10 percent of the population in the 2000 census violates this provision because it is not an "actual Enumeration." The Defendants' election to add computer generated population numbers to (or subtract real people from) the census through a process of statistical sampling and adjustment violates this provision because it is not an "actual Enumeration."

76. The Defendants' decision to omit at least 10 percent of the population and further add population numbers through statistical sampling and adjustment is not a good faith effort, or reasonably calculated, to accomplish an actual enumeration of the population. It is also inconsistent with the constitutional goal of equal representation.

COUNT III

77. Plaintiffs repeat and reallege each allegation contained in paragraph 1 through 76 and incorporate them herein by reference.

78. The Fourteenth Amendment of the Constitution mandates that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . ." U.S. Const., Amend. XIV, § 2.

79. The Defendants' decision to deliberately fail to count at least 10 percent of the persons in a state for the 2000 census violates this provision because it will apportion representatives on the basis of a census that has failed to "count the whole numbers of persons in each State." The Defendants' decision to add popula-

tion numbers through a process of statistical sampling and adjustment violates this provision because it will apportion representatives on the basis of a census that has failed to "count the whole numbers of persons in each State."

80. The Defendants' decision to omit at least10 percent of the population and further add population numbers through statistical sampling and adjustment is not a good faith effort, or reasonably calculated, to count the whole numbers of persons in each state. It is also inconsistent with the constitutional goal of equal representation.

COUNT IV

81. Plaintiffs repeat and realleges each allegation contained in paragraph 1 through 80 and incorporate them herein by reference.

82. Plaintiffs have a right to equal representation for equal numbers of people and to have their congressional districts bear a reasonable relationship to the actual enumeration of the population.

83. The Department must engage in a good faith effort to conduct an enumeration of the population so that federal districts are based on this enumeration. Since the Defendants will not conduct an actual enumeration of at least 10 percent of the population and will further adjust these results statistically, any congressional district based on this census will not bear a reasonable relationship to an actual enumeration of the population or the constitutional goal of equal representation.

84. As a result of the Defendants action, the individual Plaintiffs will be deprived of their right to vote in districts that bear a reasonable relation to an actual

enumeration and their right to equal representation for equal numbers of people. This vote dilution is unconstitutional. U.S. Const., Art. I, § 2.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

(a) Convene a three judge panel to hear and decide this case pursuant to 28 U.S.C. § 2284 and § 209(e)(1) of the 1998 Appropriations Act;

(b) Declare Defendants' decision to omit at least 10% of the population and to use statistical sampling to adjust the 2000 Census population for purposes of apportionment of Representatives among the several States in connection with the 2000 Census to be in violation of the laws and Constitution of the United States.

(c) Permanently enjoin Defendants from taking any further action to implement any plan which does not attempt to count 100% of the population or which utilizes statistical sampling to adjust the population for purposes of apportionment of the Representatives among the several States and require Defendants to do an actual count of the population; and,

(d) Award to Plaintiffs such additional and further relief as the Court deems just and proper, including, but not limited to, their costs and attorney's fees incurred in bringing this action.

Respectfully Submitted,

/s/ ROBERT J. CYNKAR

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action File No. 98-207-A

MATTHEW GLAVIN,
A RESIDENT OF THE STATE OF GEORGIA;
ROBERT BARR,
INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES;
GARY A. HOFMEISTER,
A RESIDENT OF THE STATE OF INDIANA;
STEPHEN GONS,
A RESIDENT OF THE STATE OF PENNSYLVANIA;
JAMES F. MCLAUGHLIN,
A RESIDENT OF THE STATE OF NEW JERSEY;
DAVID H. GLAVIN, A RESIDENT OF THE STATE OF OHIO;
JOHN TAYLOR,
A RESIDENT OF THE COMMONWEALTH OF VIRGINIA;
DEBORAH HARDMAN,
A RESIDENT OF THE STATE OF FLORIDA;
CRAIG MARTIN,
A RESIDENT OF THE STATE OF CONNECTICUT;
JIM LACY, A RESIDENT OF THE STATE OF CALIFORNIA;
JUDY CRESANTA,
A RESIDENT OF THE STATE OF NEVADA;
HELEN V. ENGLAND,
A RESIDENT OF THE STATE OF ARIZONA;
AMIE S. CARTER,
A RESIDENT OF THE STATE OF MONTANA;
ROBERT RICHARD DENNIK,
A RESIDENT OF THE STATE OF WISCONSIN;
MICHAEL T. JAMES,
A RESIDENT OF THE STATE OF ILLINOIS;
WILLIAM J. BYRN, A RESIDENT OF THE STATE OF GEORGIA, INDIVIDUALLY AND IN HIS OFFICIAL

CAPACITY AS COBB COUNTY COMMISSION CHAIRMAN;
COBB COUNTY, GEORGIA;
BUCKS COUNTY, PENNSYLVANIA;
DELAWARE COUNTY, PENNSYLVANIA; AND DUPAGE
COUNTY, ILLINOIS, PLAINTIFFS

v.

WILLIAM J. CLINTON, IN HIS CAPACITY AS
PRESIDENT OF THE UNITED STATES; THE UNITED
STATES DEPARTMENT OF COMMERCE; WILLIAM M.
DALEY, IN HIS CAPACITY AS SECRETARY OF THE
UNITED STATES DEPARTMENT OF COMMERCE; BUREAU
OF THE CENSUS, AN AGENCY WITHIN THE UNITED
STATES DEPARTMENT OF COMMERCE; AND JAMES F.
HOLMES, IN HIS CAPACITY AS ACTING DIRECTOR OF
THE BUREAU OF THE CENSUS, DEFENDANTS

SECOND AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

COME NOW Plaintiffs Matthew Glavin, a resident of the State of Georgia; Robert Barr, individually, and in his capacity as a member of the United States House of Representatives; Gary A. Hofmeister, a resident of the State of Indiana; Stephen Gons, a resident of the Commonwealth of Pennsylvania; James F. McLaughlin, a resident of the State of New Jersey; David H. Glavin, a resident of the State of Ohio; John Taylor, a resident of the Commonwealth of Virginia; Deborah Hardman, a resident of the State of Florida; Craig Martin, a resident of the State of Connecticut; Jim Lacy, a resident of the State of California; Judy Cresanta, a resident of the State of Nevada; Helen V. England, a resident of the State of Arizona; Amie S. Carter, a resident of the

State of Montana; Robert Richard Dennik, a resident of the State of Wisconsin; Michael T. James, a resident of the State of Illinois; William J. Byrn, a resident of the State of Georgia, individually and in his official capacity as Cobb County Commission Chairman (hereinafter collectively referred to as " individual Plaintiffs" or "Plaintiffs"); Cobb County, Georgia; Bucks County, Pennsylvania; Delaware County, Pennsylvania; and DuPage County, Illinois (the "County Plaintiffs") and hereby make and file this their Complaint for Declaratory Judgment and Injunctive Relief against Defendants William J. Clinton, in his capacity as President of the United States; the United States Department of Commerce; William M. Daley, in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census, an agency within the United States Department of Commerce; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census (hereinafter collectively referred to as the "Defendants") as follows:

PARTIES

1. Plaintiff Matthew Glavin is a voter of the State of Georgia and Forsyth County, residing in the 9th Congressional District, the 48th State Senate District, and the 85th State House District. Mr. Glavin is a registered voter and will vote in the 2002 elections.

2. Plaintiff Robert Barr is a sitting member of the House of Representatives of the United States, representing the Seventh District of the State of Georgia, who intends to seek reelection for such office and to vote in such election. Representative Barr resides in Cobb County and votes in the 32nd State Senate District and 29th State House District.

3. Plaintiff Gary A. Hofmeister is a voter of the State of Indiana and Marion County, residing in the 10th Congressional District, the 30th State Senate District and the 87th State House District. Mr. Hofmeister is a registered voter and will vote in the 2002 elections.

4. Plaintiff Stephen Gons is a voter of the Commonwealth of Pennsylvania and Cumberland County, residing in the 19th Congressional District, the 31st State Senate District and the 88th State House District. Mr. Gons is a registered voter and will vote in the 2002 elections.

5. Plaintiff James F. McLaughlin is a voter of the State of New Jersey and Bergen County, residing in the 5th Congressional District, the 39th State Senate District, and the 39th State House District. Mr. McLaughlin is a registered voter and will vote in the 2002 elections.

6. Plaintiff David H. Glavin is a voter of the State of Ohio and Cuyahoga County, residing in the 19th Congressional District, the 22nd State Senate District and the 15th State House District. Mr. Glavin is a registered voter and will vote in the 2002 elections.

7. John Taylor is a voter in the Commonwealth of Virginia and Loudoun County, residing in the 10th Congressional District, the 33rd State Senate District and the 32nd State House District. Mr. Taylor is a registered voter and will vote in the 2002 elections.

8. Deborah Hardman is a voter in the State of Florida and St. Johns County, residing in the 4th Congressional District, the 8th State Senate District and the 18th State House District. Ms. Hardman is a registered voter and will vote in the 2002 elections.

9. Craig Martin is a voter in the State of Connecticut and New Haven County, residing in the 5th Congressional District, the 16th State Senate District, and the 73rd State House District. Mr. Martin is a registered voter and will vote in the 2002 elections.

10. Jim Lacy is a voter in the State of California and Orange County, residing in the 47th Congressional District, the 38th State Senate District and the 73rd State House District. Mr. Lacy is a registered voter and will vote in the 2002 elections.

11. Judy Cresanta is a voter in the State of Nevada and Washoe County, residing in the 2nd Congressional District, the 3rd State Senate District and the 25th State House District. Ms. Cresanta is a registered voter and will vote in the 2002 elections.

12. William J. Byrn is a voter in the State of Georgia and Cobb County, residing in the 7th Congressional District, the 37th State Senate District and the 34th State House District. Mr. Byrn is also the Cobb County Commission Chairman. Mr. Byrn is a registered voter and will vote in the 2002 elections.

13. Helen V. England is a voter in the State of Arizona and Maricopa County, residing in the 3rd Congressional District, the 17th State Senate District and the 17th State House District. Ms. England is a registered voter and will vote in the 2002 elections.

14. Amie S. Carter is a voter in the State of Montana and Gallatin County, residing in an at-large Congressional District, the 14th State Senate District and the 27th State House District. Ms. Carter is a registered voter and will vote in the 2002 elections.

15. Michael T. James is a voter in the State of Illinois and LaSalle County, residing in the 11th Con-

gressional District, the 38th State Senate District and the 76th State House District. Mr. James is a registered voter and will vote in the 2002 elections.

16. Robert Richard Dennik is a voter in the State of Wisconsin and Milwaukee County, residing in the 5th Congressional District, the 5th State Senate District and the 14th State House District. Mr. Dennik is a registered voter and will vote in the 2002 elections.

17. Cobb County is located in the State of Georgia and receives federal funds that are allocated on the basis of the results of the census.

18. Bucks County is located in the Commonwealth of Pennsylvania and receives federal funds that are allocated on the basis of the results of the census.

19. Delaware County is located in the Commonwealth of Pennsylvania and receives federal funds that are allocated on the basis of the results of the census.

20. DuPage County is located in the State of Illinois and receives federal funds that are allocated on the basis of the results of the census.

21. Defendant William J. Clinton is President of the United States and is being sued in his capacity as such. Defendant Clinton may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

22. Defendant United States Department of Commerce is a department within the executive branch of the government of the United States of America and an "agency" within the meaning of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701, *et seq.* Defendant Commerce Department may be served with a

copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

23. Defendant William M. Daley is the Secretary of Commerce, and he is being sued in his capacity as such. Defendant Daley may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

24. Defendant Bureau of the Census is an agency within the Commerce Department, and is an "agency" within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* (the "APA"). Defendant Census Bureau may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

25. Defendant James F. Holmes is the Acting Director of the Census Bureau and is being sued in his capacity as such. Defendant Holmes may be served with a copy of the Summons and Complaint in accord with Fed. R. Civ. P. 4(i)(2).

JURISDICTION AND VENUE

26. This civil action is a case of actual controversy between Plaintiffs and Defendants which arises under the Constitution of the United States and a federal statute and may be finally adjudicated as between the parties. The rights here sought to be redressed are rights guaranteed by Article I, § 2, cl.3; the First and Fourteenth Amendments to the United States Constitution; 2 U.S.C. § 2a; the Census Act of 1976, 13 U.S.C. § 1 *et seq.*

27. Congress has specifically granted this Court jurisdiction over this case pursuant to the Departments of Commerce, Justice, State, the Judiciary, and Related

Agencies Appropriations Act, 1998, P.L. 105-119 (November 26, 1997) (the "1998 Appropriations Act").

28. Jurisdiction is also conferred upon this Court by 28 U.S.C. §§ 1331 and 1343(a)(4). A declaration of rights is sought pursuant to 28 U.S.C. §§ 2201, 2202 and the 1998 Appropriations Act, P.L. 105-119, § 209(b).

29. Plaintiffs are entitled to have this case heard and decided by a three judge panel pursuant to the 1998 Appropriations Act, P.L. 105-119, § 209(e)(1) and 28 U.S.C. § 2284 because this case challenges the constitutionality of the method by which the Commerce Department and its agency, the Census Bureau, will determine the population of the United States for purposes of apportioning representation among the several States. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(3) as plaintiff John Taylor resides in this judicial district and "no real property is involved in the action."

STATEMENT OF FACTS

THE LEGAL FRAMEWORK OF THE CENSUS

30. The United States Constitution requires that congressional "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . ." U.S. Const., Amend. XIV, § 2; Art. I, § 2, cl. 3.

31. The Department of Commerce and its agency, the Bureau of the Census (collectively referred to as the "Department"), have been charged by Congress with the duty to conduct a decennial census in such manner as Congress "shall by Law direct" and in accord with the language and purpose of the Constitution.

U.S. Const. Art. I, § 2, cl. 3; Census Act of 1976, 13 U.S.C. § 21.

32. Following each decennial census, the President of the United States is required to transmit to Congress "a statement showing the whole number of persons in each State" and "the number of Representatives to which each State would be entitled" under a lawful apportionment on the first day, or within one week, of the first regular session of Congress. 2 U.S.C. § 2a(a).

33. The Clerk of the House of Representatives is required to transmit to the executive of each State "a certificate of the number of Representatives to which [each] State is entitled," within fifteen days of receipt of the apportionment statement from the President, based on the apportionment of the population derived from the decennial census. 2 U.S.C. § 2b.

34. After receiving the apportionment certification from the Clerk of the House, the States are required to establish congressional districts equal to the number of Representatives to which each State is entitled and "Representatives shall be elected only from districts so established." 2 U.S.C. § 2c.

35. The decennial census is the foundation of representative government under the Constitution because it provides the basis for apportionment of the number of congressional Representatives to which each State is entitled and the number of Electors from each State who, representing the people, elect the President of the United States. U.S. Const., Art. I, § 2, cl. 2; Art. II; 2 U.S.C. §§ 2c, 3.

36. The census also plays an important role in intrastrate redistricting because "State and local governments use census data to draw legislative districts

of equal population to comply the with constitutional 'one man, one vote' mandate." REPORT TO CONGRESS – THE PLAN FOR CENSUS 2000, July 1997, as revised and reissued in August 1997, (the "Riche Report") at 1. In fact, many state constitutions and statutes require the state to utilize the federal census in conducting their redistricting. Arizona, California, Connecticut, Florida, Georgia, Indiana, Montana, Nevada, New Jersey, Ohio, Pennsylvania, Virginia, and Wisconsin have such a requirement.

37. The census also has important ramifications for state and local governments and their residents because census data are used "to determine allocation formulas for the distribution of billions of dollars of federal and state funds each year." Riche Report at ix.

38. The Constitution prohibits the intentional omission of any person from the decennial census by mandating that Congress, through the Department, conduct an "actual Enumeration" and engage in "counting the whole number of persons in each State" to implement the constitutional scheme of representative government, as envisioned by the Framers. U.S. Const., Art. I, § 2, cl. 3; XIV Amend. For similar reasons, it prohibits the decennial census' population figures to be based on a statistical estimate or anything other than an actual counting of real persons.

39. Pursuant to the Census Act of 1976 (the "Census Act"), Congress has also expressly prohibited the Department from using the statistical method known as "sampling" in conducting the decennial census for determining the population for purposes of apportionment of Representatives among the several States. Census Act of 1976, 13 U.S.C. § 195.

40. On June 5, 1997, Congress enacted the Supplemental Appropriations and Rescissions Act (the "Supplemental Appropriations Act") H.R. Cong. Report No. 119, 105th Congress, 1st Session, June 4, 1997, which, in relevant part, prohibited the Department from utilizing any funds "to plan or otherwise prepare for the use of sampling or any other statistical procedure, including statistical adjustment in any determination of population for purposes of the apportionment of Representatives in Congress among the several States."

41. On June 9, 1997, Defendant Clinton vetoed the Supplemental Appropriations Act based on his opinion that "the Constitution and relevant statutes permit the use of sampling in the decennial census." Message of Cancellation, 1997 WL 307949.

42. In November of 1997, Congress appropriated funding for the Commerce Department, including funds for conducting the 2000 Census, finding that "the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." 1998 Appropriations Act, P.L. 105-119, § 209(a)(2).

The Department's Plan For Statistical Sampling and Adjustment

43. Every census since the founding of the Republic has attempted to count each person. Each such census has actually enumerated the number of people. In other words, the number of persons has always been determined by means of an actual head count.

44. Given the inherent difficulties of actually enumerating the population, each census has unintentionally failed to count some people.

45. For the first time in the Nation's history, the federal government has decided that it will intentionally fail to count at least 10 percent of the population. Thus, at least 26 million Americans will be deliberately omitted from the census if the Plan for Census 2000 is implemented. In addition, population figures produced pursuant to the Plan will not represent the sum of the omitted 10% and the 90% sought to be counted, but will be further adjusted upward based on estimates derived from statistical sampling and inference.

46. Congress enacted the 1997 Emergency Supplemental Appropriations Act for Recovery from Natural Disasters ("1997 Disaster Relief Bill") which, in relevant part, required the Department to provide Congress with a written report containing a statement of the methodologies to be used in the conduct of the 2000 Census.

47. As required by the 1997 Disaster Relief Bill, the Department issued the Riche Report which commits the Department to using statistical sampling in lieu of an actual enumeration for calculating the population in the 2000 Census.

48. In July of 1997, the Department published its *Census 2000 Operational Plan* (the "Plan"), further confirming its intent to substitute statistical sampling for actual enumeration in the 2000 Census. The Plan further confirms that the Department will deliberately omit approximately 26 million people (ten percent of the population) from its actual count.

49. The Department has specified that it will use the following methodology in conducting the 2000 Census: First, the Department will send questionnaires to households identified on its Master Address List.

Second, the Department will conduct a non-response follow-up for some of those households which did not respond to the questionnaires. "The nonresponse follow-up operation in Census 2000 will incorporate the use of sampling to yield a 90 percent completion rate at the census tract level." Riche Report at 18. Once the Department has attempted to count 90 percent of the population, no further effort will be made to count the missing persons. The Department will use statistical sampling to add computer-generated population numbers to compensate for the intentional undercount of 10% of all housing units. This estimate of virtual persons will be modeled after the composition of those persons who were counted only as a result of the follow-up efforts. Thus, these fictional persons will not reflect the overall demographic composition of all the persons that were actually counted in that area.

50. After using sampling to achieve a statistical estimation of 100% of the population, the Department will further manipulate the population estimate by an additional statistical methodology known as integrated coverage management ("ICM"). ICM relies upon dual system estimation ("DSE") pursuant to which the Department will carefully count the actual number of people in a limited number of areas, a sample of 25,000 census blocks out of 7 million nationwide. Riche Report at 30. The Department will then compare the results of this careful head count to the numbers derived from the direct responses of the counting phase. It will then infer that demographic deviations from the initial calculation will occur throughout the rest of the state in question for each particular strata that is measured. "These strata will be based on the characteristics of each block in the 1990 census, such as the block's state,

racial and ethnic status, and proportion of homeowners to renters." Riche Report at 30.

51. According to the Department, "Compared to the undercount rate for non-Hispanic Whites, the 1990 undercount rates were six times larger among African Americans and seven times larger among Hispanics." Riche Report at 4. Thus, the computer-generated persons created by the Department will include a disproportionately high number of these minority groups. Any adjustments based on this methodology will have the effect of increasing the relative population of areas with a disproportionately large number of minorities under a virtual census as compared to an actual head count and decreasing the relative population of areas with a disproportionately fewer number of minorities.

52. The post-enumeration survey ("PES") conducted by the Department after the 1990 census also utilized DSE. The Department has based its simulations of the 2000 census on the premise "that the percentage undercounts (and overcounts) measured for each group in the 1990 PES also would apply in Census 2000." Riche Report at 45.

53. In short, the census will utilize statistical sampling in at least three ways: 1) to conduct non-response follow-up and thus to arrive at an estimation of 90 percent of the population; 2) to model that number to an estimation of 100 percent of the population; 3) to adjust that estimate to take into account demographic deviations that are discovered through the process of ICM.

54. Congress has found that "the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the

Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted." 1998 Appropriations Act, P.L. 105-119, § 209(a)(8).

55. Federal law requires the Secretary of Commerce to report a tabulation of the total population by States to the President by January 1, 2001, and in turn requires the President to "transmit to the Congress a statement showing the whole number of persons in each state" by January 8, 2001. 13 U.S.C. § 141(b); 2 U.S.C. § 2a. In light of the significant practical difficulties of conducting an actual head count of the population, the Defendants will not be able to conduct an actual head count by January 1, 2001, unless they begin this process in 1999 at the latest. Thus, absent judicial intervention in the immediate future, the Defendants cannot provide lawful or constitutional census figures by January 1, 2001, the date required by statute and the Constitution. Moreover, if the Department is required to conduct an actual head count at any time after January 1, 2001 it will be unable to complete an actual head count in time to provide the Congress and the states with the census data they need to create equally populated congressional districts for the 2002 elections. Thus, if the legality and constitutionality of the Department's Census Plan is not resolved in the immediate future, it will not be possible to use an actual head count, or any lawful or constitutional census, as apportionment or redistricting figures for the 2002 elections or other legally mandated purposes.

56. The 1998 Appropriations Act provides that "the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation

for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census." 1998 Appropriations Act, P.L. 105-119, § 209(c)(1).

57. The Riche Report, ordered by Congress in title VIII of Public Law 105-118, and the Census 2000 Operational Plan, have been deemed by Congress to be sufficiently concrete and final so as to constitute final agency action regarding the use of statistical methods in the 2000 decennial census. 1998 Appropriations Act, P.L. 105-119, § 209(c)(2).

58. On April 1, 1998, the Department will commence the 2000 Census by conducting the "Census 2000 Dress Rehearsal" to perform operational testing of procedures and systems to be used in the 2000 Census. Census 2000 Operational Plan at XIII-3.

59. The 2000 Census commences with the Dress Rehearsal, which implements the Department's plan to eliminate the actual head count performed in every other census and, instead, to use a partial head count and to use statistical methodology to add to or subtract from the number of persons counted in the partial head count.

PLAINTIFFS' INJURIES

60. Congress has provided by law that "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory,

injunctive, and any other appropriate relief against the use of such method." 1998 Appropriations Act, P.L. 105-119, § 209(b).

61. Pursuant to § 209(d) of the 1998 Appropriations Act, an "aggrieved person" entitled to seek relief under the statute "includes:1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action; 2) any Representative or Senator in Congress; and 3) either House of Congress."

62. Plaintiffs are aggrieved persons within the meaning of the Appropriations Act and will suffer several discrete, concrete injuries as a result of the Defendants' failure to conduct an actual head count aimed at enumerating the entire population, as the Constitution and the Census Act require.

63. The individual Plaintiffs will suffer vote dilution and a loss of relative political representation as a result of the Defendants' Plan. As residents of areas that will receive a disproportionately low amount of population under the statistical methodology employed by the Plan, the individual Plaintiffs will have less relative population and voting strength than they would have enjoyed if the census were conducted on the basis of an actual head count. Specifically, the relative political representation and voting strength of their districts will be artificially diminished because these districts will be awarded a disproportionately low number of computer-generated persons.

64. This vote dilution will occur both at the intrastate and interstate level. Within the individual Plaintiffs' states, these Plaintiffs will suffer a decrease in their relative voting strength as representatives are

subtracted and their district's or county's political strength is artificially diminished as a result of the Defendants' statistical sampling and adjustment. Plaintiffs residing in Maricopa, Bergen, Washoe, Orange, Cobb, St. Johns, and Gallatin Counties will suffer a dilution in their voting strength because sampling will decrease the political representation and strength of these counties within their states. The individual Plaintiffs residing in Cumberland County, Pennsylvania, and LaSalle County, Illinois, will suffer a decrease in their voting strength because the Department will actually subtract population from the actual headcount conducted there. Similarly, individual Plaintiffs' political representation in Congress will be adversely affected. There is a substantial likelihood and probability that at least one of the Plaintiffs residing in Indiana, Wisconsin, Pennsylvania, Illinois or Ohio will lose, or fail to gain, a seat in the House of Representatives as a direct result of the Department's sampling Plan.

65. But for the Defendants' decision to substitute statistical sampling for an actual enumeration of the population, the individual Plaintiffs residing in Maricopa, Bergen, Orange, Washoe, St. Johns, Cobb, Gallatin, and Cumberland Counties would live in districts with more political representation and districts and counties that would receive more federal funding.

66. The Congressional representation, or district, of all of the Plaintiffs could be changed as a result of the use of Defendants' statistical methodology.

67. If the Department fails to conduct an actual head count, there will be no valid census which state governments may use to redistrict for the 2002 federal and state elections. If the Department is allowed to conduct a virtual census and it is subsequently invalidated, the

Department will not be able to conduct an actual head count in time to provide the Congress and the States with census figures in time for them to redistrict by the 2002 elections. Plaintiffs' fundamental rights to representation based on a timely apportionment of their federal and state districts, to equal representation and to vote will be irreparably injured if the 2002 elections are delayed and/or conducted in districts based on an unlawful 2000 census or the 1990 census figures.

68. Several of the individual Plaintiffs live in districts whose population has increased significantly since 1990. At the interstate level, several of the individual Plaintiffs reside in Georgia, which is virtually certain to gain an extra seat in Congress after the next decennial census is conducted, regardless of whether sampling or an actual headcount is pursued. At the intrastate level, several of the individual Plaintiffs reside in Forsyth County, Georgia, Cobb County, Georgia, Loudoun County, Virginia, and St. Johns County, Florida, whose population has grown significantly during the 1990's. These Plaintiffs will suffer an irreparable loss of their share of political representation both in Congress and in state legislatures as a direct consequence of the Defendants' failure to conduct a lawful and constitutional census and apportionment.

69. Since the State of Georgia will be unable to redistrict based on a legally constitutionally valid apportionment, Plaintiff Robert Barr will be unable to take his seat as a member of the House of Representatives in a timely and orderly manner and his constituents' constitutional right to petition the government will be adversely affected.

70. The County Plaintiffs currently receives funds from a variety of federal programs that are statutorily

required or authorized to allocate their resources on the basis of the census. If the Department's Plan is implemented, it will determine the level of funding that the County Plaintiffs receives. The County Plaintiffs will be adversely affected by the Department's Plan because these plaintiffs will be awarded a disproportionately small number of computer generated population as compared to their neighbors. As a result, these plaintiffs will receive less federal funding than they would have if the census were lawfully conducted on the basis of an actual head count.

71. Alternatively, if the Department's Plan were implemented and then invalidated, the County Plaintiffs would be injured by the resulting delay in comleting a constitutional census. The population in these counties has increased at a disproportionately high rate since 1990, and thus these counties will be entitled to an increase in federal funding that is allocated on the basis of the census. A delay in the completion of a constitutional census directly inflicts financial injury on the County Plaintiffs.

72. The Plaintiffs have no adequate remedy at law.

COUNT I

73. Plaintiffs repeat and reallege each allegation contained in paragraph 1 through 72 and incorporate them herein by reference.

74. Congress has delegated to the Department the duty to conduct the decennial census in such manner as Congress "shall by Law direct." U.S. Const. Art. I, § 2, cl. 3; Census Act of 1976, 13 U.S.C. § 21.

75. Through the Census Act, Congress has directed the Department not to use statistical sampling "for the determination of population for purposes of apportionment of Representatives in Congress among the several States." The Census Act of 1976, 13 U.S.C. § 195; *see also* 13 U.S.C. § 141(e)(2).

76. The Defendants will use statistical sampling, in place of an actual count of the population, for the 2000 Census for the purposes of apportionment. The Defendants' use of statistical sampling violates Section 195 of the 1976 Census Act.

COUNT II

77. Plaintiffs repeat and reallege each allegation contained in paragraph 1 through 76 and incorporate them herein by reference.

78. Article I, Section 2 of the Constitution requires that the census shall be made on the basis of an "actual Enumeration" every ten years. U.S. Const., Art. I., § 2, cl. 3. The Defendants' decision to deliberately fail to count at least 10 percent of the population in the 2000 census violates this provision because it is not an "actual Enumeration." The Defendants' election to add computer generated population numbers to (or subtract

real people from) the census through a process of statistical sampling and adjustment violates this provision because it is not an "actual Enumeration."

79. The Defendants' decision to omit at least 10 percent of the population and further add population numbers through statistical sampling and adjustment is not a good faith effort, or reasonably calculated, to accomplish an actual enumeration of the population. It is also inconsistent with the constitutional goal of equal representation.

COUNT III

80. Plaintiffs repeat and reallege each allegation contained in paragraph 1 through 79 and incorporate them herein by reference.

81. The Fourteenth Amendment of the Constitution mandates that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . ." U.S. Const., Amend. XIV, § 2.

82. The Defendants' decision to deliberately fail to count at least 10 percent of the persons in a state for the 2000 census violates this provision because it will apportion representatives on the basis of a census that has failed to "count the whole numbers of persons in each State." The Defendants' decision to add population numbers through a process of statistical sampling and adjustment violates this provision because it will apportion representatives on the basis of a census that has failed to "count the whole numbers of persons in each State."

83. The Defendants' decision to omit at least10 percent of the population and further add population numbers through statistical sampling and adjustment is not

a good faith effort, or reasonably calculated, to count the whole numbers of persons in each state. It is also inconsistent with the constitutional goal of equal representation.

COUNT IV

84. Plaintiffs repeat and realleges each allegation contained in paragraph 1 through 83 and incorporate them herein by reference.

85. Plaintiffs have a right to equal representation for equal numbers of people and to have their congressional districts bear a reasonable relationship to the actual enumeration of the population.

86. The Department must engage in a good faith effort to conduct an enumeration of the population so that federal districts are based on this enumeration. Since the Defendants will not conduct an actual enumeration of at least 10 percent of the population and will further adjust these results statistically, any congressional district based on this census will not bear a reasonable relationship to an actual enumeration of the population or the constitutional goal of equal representation.

87. As a result of the Defendants action, the individual Plaintiffs will be deprived of their right to vote in districts that bear a reasonable relation to an actual enumeration and their right to equal representation for equal numbers of people. This vote dilution is unconstitutional. U.S. Const., Art. I, § 2.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

(a) Convene a three judge panel to hear and decide this case pursuant to 28 U.S.C. § 2284 and § 209(e)(1) of the 1998 Appropriations Act;

(b) Declare Defendants' decision to omit at least 10% of the population and to use statistical sampling to adjust the 2000 Census population for purposes of apportionment of Representatives among the several States in connection with the 2000 Census to be in violation of the laws and Constitution of the United States.

(c) Permanently enjoin Defendants from taking any further action to implement any plan which does not attempt to count 100% of the population or which utilizes statistical sampling to adjust the population for purposes of apportionment of the Representatives among the several States and require Defendants to do an actual count of the population; and,

(d) Award to Plaintiffs such additional and further relief as the Court deems just and proper, including, but not limited to, their costs and attorney's fees incurred in bringing this action.

May 7th, 1998

Respectfully Submitted,

/s/ ROBERT J. CYNKAR

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action File No. 98-207-A

GLAVIN, BARR, ET AL., PLAINTIFFS

v.

CLINTON, ET AL, DEFENDANTS

AFFIDAVIT OF DR. RONALD E. WEBER

I, Ronald E. Weber, if called upon to testify, could testify to the following on my own knowledge and belief:

1. I make this affidavit in support of Plaintiffs' Memorandum of Law In Opposition To Defendants' Motion To Dismiss.

2. I am currently the Wilder Crane Professor of Government in the Department of Political Science at the University of Wisconsin, Milwaukee, Wisconsin; President of Campaign and Opinion Research Analysts, Inc.; former co-editor of *The Journal of Politics* and Chairman of the Department of Political Science at the University of Wisconsin, Milwaukee; and former Fulbright Commission John Marshall Professor of Political Science at the Budapest University of Economic Sciences and the Central European University, Budapest, Hungary (1996-97). I received my B.A. in Political Science and History from Macalester College, St. Paul, MN, in 1964 and a Ph.D. in Political Science from Syracuse University in 1969, with specialties in American state politics, voting behavior,

and quantitative analyses of political data. A copy of my curriculum vitae is attached as Exhibit A.

3. I am the author of numerous scholarly works on U.S. state political behavior and public policy-making, including several works on U.S. state legislative elections and voting behavior at the individual and aggregate levels of analysis and on U.S. state policy-making at the aggregate level of analysis. These works have appeared in such academic journals as the *American Political Science Review*, *The Journal of Politics*, *Midwest Journal of Political Science*, *Public Opinion Quarterly*, *American Politics Quarterly*, and *Legislative Studies Quarterly*.

4. I have been retained as a consultant and expert witness in a number of redistricting and voting rights cases and have been qualified as an expert by the U.S. District Courts in the Middle District (Northern and Southern Divisions) of Alabama, the Northern (Tallahassee Division) and Middle (Jacksonville Division) Districts of Florida, the Southern District (Augusta Division) of Georgia, the Northern District (Eastern Division) of Illinois, the Eastern, Middle, and Western Districts of Louisiana, the District of Maryland, the District (Western Division) of Massachusetts, the Eastern District (Southern Division) of Michigan, the Northern District (Eastern and Western Divisions) of Mississippi, the Eastern District (Eastern Division) of Missouri, the District of Nebraska, the Southern District of New York, the Northern (Dallas Division), Southern (Houston Division) and Western (Austin Division) Districts of Texas, the Eastern District of Virginia (Richmond Division), and the Eastern District of Wisconsin. I have given testimony by deposition in a

number of cases, including a deposition for the plaintiffs in the Congressional redistricting case of *Shaw v. Reno*, n/k/a *Shaw v. Hunt* (Eastern District of North Carolina, Raleigh Division). I have testified or executed a declaration in a number of Congressional and state legislative redistricting cases, including *Johnson v. Miller* (Southern District of Georgia, Augusta Division), *Vera v. Richards* (Southern District of Texas, Houston Division), *Hays v. State of Louisiana* (Western District of Louisiana, Shreveport Division), *Johnson v. Mortham* (Northern District of Florida, Tallahassee Division), *Moon v. Meadows* (Eastern District of Virginia, Richmond Division), *Cromartie v. Hunt* (Eastern District of North Carolina, Eastern Division), *DeGrandy v. Wetherell* (Northern District of Florida, Tallahassee Division), *NAACP v. Austin*, (Eastern District of Michigan, Southern Division), and *Thomas v. Bush*, (Western District of Texas, Austin Division). A full listing of the cases in which I have testified in Federal court or I was deposed under oath is attached as Exhibit B.

5. I also have extensive experience using U.S. Bureau of the Census data to develop redistricting plans for local and state governments and providing assistance in obtaining preclearance of redistricting plans pursuant to Section 5 of the Voting Rights Act of 1965, as amended in 1982. I have analyzed and reviewed books, articles, reports, and papers on the apportionment of seats within the U.S. House of Representatives, legal documents governing the allocation of seats within state and local legislative bodies, as well as books, articles, reports, and papers on the allocation and distribution of Federal government funds to the

states and localities and the allocation and distribution of state government aid to local governments.

6. I have been retained by plaintiffs in this case and am being compensated at the rate of $125 per hour plus out-of-pocket expenses. Neither the amount of my compensation nor the fact that I am being compensated has altered the opinions that I have given and will give in this affidavit and case.

I. Methodologies and Data

7. In making my analysis for this affidavit, I reviewed data published by the Bureau of the Census, including (1) Committee on Adjustment of Postcensal Estimates, Bureau of the Census, U.S. Department of Commerce, *Report of the Committee on Adjustment of Postcensal Estimates* (Aug. 7, 1992) ("CAPE Report")[1]; (2) Bureau of the Census, U.S. Department of Commerce, *Report To Congress—The Plan For Census 2000* (July 1997, revised August 1997) (the "Riche Report") and Bureau of the Census, U.S. Department of Commerce, *Census 2000 Operational Plan* (July 1997) (the "Operational Plan") and related documents (collectively referred to as the "Plan"); and (3) population data published by the Bureau of the Census, including population numbers reported in previous censuses used to calculate the apportionment of seats in the U.S. House and Electors in the Electoral College, as well as population estimates and population projections for states, cities and counties.

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[1] *Copies of the Riche Report, Operational Plan and CAPE Report have been filed with the Court as Plaintiffs' Motion for Summary Judgment Exhibits A, B and F, respectively.*

8. The Plan relies upon statistical sampling methodologies to compute an estimated total population to be reported in the year 2000. First, the Department of Commerce ("the Department") will deliberately exclude 10% of the population from its efforts to conduct a traditional head count of the population. The population that is not enumerated will be estimated from a sample of the nonresponding population. Riche Report at 27-29. Second, the Department will adjust the total population numbers obtained in the first phase of the census according to a statistical model in the Integrated Coverage Measurement phase of the Plan. The Department makes the assumption that people with shared demographic characteristics are equally likely to be missed, or counted more than once, in the census. Riche Report at 30. By assigning an "adjustment factor" to these demographic groups, the Department will adjust the number of people counted in the census to comport with a statistical model. Riche Report at 32. Typically, adjustment factors exceed 1 because most demographic groups selected by the Department are estimated to have undercounts. *See* CAPE Report. However, many adjustment factors are *less than 1*; these groups are estimated to have been overcounted by the census. *Id.*

9. Under the Department's Plan, an actual head count of the actual population will not be conducted. Thus, even after the implementation of the Department's Plan, there will be no population numbers available based upon a complete traditional enumeration. Indeed, the Department's Plan intends to deliberately omit approximately 10% of the population from its actual head count.

10. If the Department's Plan is invalidated after it has been implemented, it will be impossible for the Department or the states to conduct a complete head count of the population prior to either the state elections in the year 2001 or the state and federal elections in the year 2002. Conducting an actual enumeration is an extremely time-consuming and expensive undertaking that cannot be completed in such a short time frame.

11. The CAPE Report contains a listing of Revised Net Undercount Rates ("NUR") for the 1990 census. The NUR are the factors that would have been used as multipliers to adjust the population numbers in the 1990 census. For each adjustment rate (NUR) in the CAPE Report, the Department has calculated the standard error and chosen a preferred point in the range of possible rates as the reported net undercount rate (NUR). The NUR in the CAPE Report are the best available data with respect to adjustment of population numbers and the Department is also currently using these sources as "the best available data" to analyze the Department's progress in implementing the Plan for Census 2000. *GAO/GGD-97-142* at 9.

12. As nearly every analysis of the undercount in the census acknowledges, there are certain demographic characteristics which are related to the measured undercount. One of the largest components of this is race and Hispanic origin. *See* Riche Report at 3-4, 31. More particularly, the main components of the NUR rely on the same demographic factors to be used pursuant to the Plan, including minority status, ethnicity, urban/rural place of residence, and owner/renter status. Therefore, areas which had high per-

centages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of these populations in 2000. While a variance in the minority population in these areas in 2000 might affect the degree of the measured undercount, it is unlikely to have a material effect on the direction of adjustment in these areas.

13. With respect to projected numbers for the year 2000, I have used projections issued by the Department for July 1, 2000. The two most recent releases are those issued in November of 1996 (PPL-47) and March of 1994 (Series P25-1111). For each projection, the Department denominates one set of population projections as the "Preferred Series."

14. Using the "Preferred Series" of population projections for 2000 and the NUR, I calculated the adjusted populations of states for 2000 based upon both a traditional enumeration and the Department's Plan. Further, I calculated, as a percentage, the difference in population numbers projected for 2000 for states under a traditional enumeration and the Department's Plan. Further, I calculated the number of seats to be apportioned to each State based upon the so-called "method of equal proportions" under both the Department's Plan and a traditional enumeration.[2] The "method of equal proportions" is the same formula used for the past six census-based apportionments and which will be used to apportion the seats to the states following the 2000 Census for the congressional

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[2] *See M.L. Balinski and H.P. Young, Fair Representation: Meeting the Idea of One Man, One Vote. New Haven: Yale University Press, 1983; Lawrence F. Schmeckebier, Congressional Apportionment. Washington: Brookings Institution, 1941.*

elections to be held in November 2002. Under the formula, the population of each state is multiplied by a constant which is mathematically determined to test the priority of each state for an additional seat in the House. The only variable entered into the formula is the population of the states, as reported in the decennial census. Any variation in the population will modify the priority ranking of the states and can cause a state to lose, or fail to gain, an additional seat.

15. My projections for 2000 are based upon the assumption that the apportionment would be made upon these projections for July 1 of that year, when, in fact, the apportionment would actually be made upon the numbers from the April 1, 2000 census. This assumption was necessary because all estimates and projections from the Department are as of July 1 of the subject year.

16. In projections to determine how the Plan for the 2000 census would affect the apportionment of seats in the U.S. House, I assumed that the adjustment factors for 2000 will be substantially similar to the corrected 1990 Post Enumeration Survey ("PES") NUR, as revised in July 1992. These rates reflect a national net undercount of 1.584%.

17. The CAPE Report states the 1990 NUR for all states, and counties and cities over 100,000 population. Using this data, I calculated proportionate shares for each county and state in which the individual plaintiffs reside. The shares calculated for each such county and state represent the following: (1) its percentage of the population of the nation under a traditional enumeration; (2) its percentage of the population of the nation with adjustment under the Department's Plan; (3) the percentage of the population of the state (for counties)

under a traditional enumeration; and (4) the percentage of the state (for counties) with adjustment under the 2000 plan. All these data were calculated on the basis of 1990 data. For each state and county, I calculated the difference in the percentage, under a traditional enumeration and under the Department's Plan.

18. I have denominated the difference between the adjusted and unadjusted populations as the "Shift in Share." The Shift in Share for each state and county forms the basis for my analysis of relative impact of using adjusted data to redistrict congressional and state legislative districts and for the differential allocation of federal and state funding. The Shift in Share predicts the direction and degree of change of the area's proportionate share of a finite resource, such as political representation or funding. Because the amount of federal funding appropriated for grants to states and counties is finite, the Shift in Share provides a means of assessing how a change in the population for any state or county will affect its share of the total resource.

19. I have also calculated a second indicator which predicts the specific impact of adjustment for states and counties. This indicator is denominated as the "Local Differential." The Local Differential is calculated by dividing the Shift in Share by the preadjustment Share. The Shift in Share assesses the relationship between the impact of adjustment on any one state or county with respect to other states or counties. In contrast, the Local Differential assesses the impact of adjustment on the size of the actual resources received by any particular state or county.

20. Thus, the Shift in Share is the absolute difference in the change of a state's or county's position,

and the Local Differential is the relative change in position.

II. Findings

A. Vote Dilution In Federal Elections

21. In determining whether the statistical methodology described in the Plan is substantially likely to affect apportionment of congressional representation and the number of Electors to the Electoral College with respect to the states where Plaintiffs reside, I conclude that, as a result of the Plan, congressional apportionment could change. Specifically, it is a virtual certainty that Indiana will lose a seat, dropping from ten seats under a traditional enumeration to nine under the Department's Plan, while Mississippi would gain a seat, going from four seats under a traditional enumeration to five under the Department's Plan. This is true for both of the Preferred Series of projections for the 2000 population released by the Department.

22. In addition, I have concluded that several other states are substantially likely to lose a seat due to the implementation of the Plan for Census 2000. The formula which is used to apportion the U.S. House seats to the states is the method of equal proportions. By this method, the proportional differences in the number of persons per representative for any pair of states is kept to a minimum. Because of the mathematical exactitude used in this formula, it can be subject to very small changes in population as between any pair of states. The contest for the last seat apportioned under the formula can be decided by only several hundreds of persons. In fact, the difference between the last seat could literally be decided by the addition of one person.

23. Although the NUR reported in the 1990 PES are relatively small, with a national rate of 1.584%, the NUR factors are of sufficient size to effect a shift of at least one seat in the U.S. House of Representatives from one state to another. In fact, if the 1990 NUR, as originally released by the Department in 1991, had been used to apportion representation among the states, the adjustment of the population numbers would have resulted in an entirely different apportionment than one using the corrected NUR, which was released in 1992. Adjusting by the 1992 factors would have caused Wisconsin to lose a seat to California. Under the 1991 factors, Wisconsin and Pennsylvania would have each lost a seat and California and Arizona would have each gained one seat. Clearly, the size of the adjustment to be implemented by the Plan is large enough to alter the apportionment of the U.S. House by at least one seat. Additionally, even if the adjustment does not cause a state to cross the threshold to lose a seat, the impact on its relative position, or rank, with respect to other states is clearly demonstrated.

24. The impact of population adjustment on a state's relative rank is that the rank may drop several positions without crossing the threshold of 435. From a review of the population projections for 2000, I can determine the effect of an adjustment of population numbers on the relative ranking of states for the last seat. Based upon all these projections, the average drop in rank is four positions for Connecticut, Indiana, Missouri, Ohio, and Wisconsin and five positions for Massachusetts, Minnesota, and Pennsylvania.

25. My analysis of multiple runs of the apportionment formula using different population bases indicates that there is a substantial likelihood that the

following states will be the ones to lose a seat if the Plan for the 2000 census is implemented. I base this assessment upon several factors, including the relative ranking of each State for an additional seat and the impact the Department's Plan would have on these ranks. Comparing seat allocations based on the 2000 projected populations under a traditional enumeration with 2000 projected populations under the Department's Plan, the States which stand a substantial likelihood of losing a seat are Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin.

B. Vote Dilution In State And Local Elections

26. I have calculated the Shift in State Share of population for the County plaintiffs and the counties in which individual plaintiffs reside. To the extent that such counties have a negative Shift in Share, these counties will lose state and federal aid, and residents of these counties will have their vote diluted. Use of the population numbers generated by the Department's Plan will result in a dilution of the individual votes of persons residing in U.S. Congressional districts, state Senate districts, and state House of Representatives districts as well as a loss of Federal and state aid for those persons residing in counties where the demographics are not subject to adjustment at the same rate as other counties in the State.

27. The Shifts in Share for states in which plaintiffs reside could change their congressional representation. With respect to the Shifts in Share for states, I calculated the following:

A. *Connecticut*: National Share for the State of Connecticut will decrease from 1.322% to 1.309%, a

Shift in Share of -.013, or a Local Differential of -0.95%.

B. *Illinois*: National Share for the State of Illinois would decrease from 4.596% to 4.568%, a Shift in Share of -.028, or a Local Differential of -0.60%.

C. *Indiana*: Indiana's National Share would decrease from 2.229% to 2.205%, a Shift in Share of -.024, or a Local Differential of -1.09%.

D. *New Jersey*: New Jersey's national share would decrease from 3.108% to 3.076%, a Shift in Share of -.032, or a Local Differential of -1.02%.

E. *Ohio*: Ohio's national share would decrease from 4.361% to 4.322%, a Shift in Share of-.039, or a Local Differential of -0.91%.

F. *Pennsylvania*: Pennsylvania's national share would decrease from 4.777% to 4.715%, a Shift in Share of -.062, or a Local Differential of -1.29%.

G. *Wisconsin*: Wisconsin's national share would decrease from 1.967% to 1.948%, a Shift in Share of -.019, or a Local Differential of -0.98%.

28. Additionally, the individual plaintiffs will be injured by adjustment of population numbers pursuant to the Plan. With respect to the Shifts in Share, I calculated the following:

A. *Maricopa County, Arizona*: State Share will decrease from 57.898% to 57.552%, a Shift in Share of -.346 relative to other counties in the state, and a Local Differential of -.60%. Residents of Maricopa

County are substantially likely to have their vote diluted in state and local elections.

B. *Bergen County, New Jersey*: State Share would decrease from 10.677% to 10.559%, a Shift in Share of -.118 relative to other counties in the state and a Local Differential of -1.11%. In fact, Bergen County is likely to have its population adjusted beneath the Department's initial "100 percent" estimate. Residents of Bergen County are substantially likely to have their vote diluted in state and local elections.

C. *Cumberland County, Pennsylvania*: State Share would decrease from 1.643% to 1.638%, a Shift in Share of -.005 relative to other counties in the state, or a Local Differential of -0.29%. In fact, Cumberland County is likely to have its population adjusted beneath the Department's initial "100 percent" estimate. Residents of Cumberland County are substantially likely to have their vote diluted in state and local elections.

D. *La Salle County, Illinois*: State Share would decrease from 0.935% to 0.928%, a Shift in Share of -.007 relative to other counties in the state, or a Local Differential of -0.77%. Residents of La Salle County are substantially likely to suffer vote dilution in state and local elections.

E. *Orange County, California*: State Share would decrease from 8.100% to 8.045%, a Shift in Share of -.055 relative to other counties in the state, or a Local Differential of -0.68%. Residents of Orange County are substantially likely to suffer vote dilution in state and local elections.

F. *St. Johns County, Florida*: While PES data are unavailable, the percentage which was minority in 1990 was only 12%, therefore, the County's relative state share is substantially likely to place it in a disadvantageous position with respect to other counties in the state which have a larger proportion of minority population. Thus, residents of St. Johns County are substantially likely to suffer vote dilution in state and local elections.

G. *Gallatin County, Montana*: While PES data are unavailable, the percentage which was minority in 1990 was only 4%, therefore the County's relative state share is likely to place it in a disadvantageous position with respect to other counties in the state which have a larger proportion of minority population. Thus, residents of Gallatin County are substantially likely to suffer vote dilution in state and local elections.

H. *Forsyth County, Georgia*: While PES data are unavailable, the percentage which was minority in 1990 was only 1.4%, therefore the County's relative state share is likely to place it in a disadvantageous position with respect to other counties in the state which have a larger proportion of minority population. Thus, it is likely that residents of Forsyth County will suffer vote dilution in state and local elections.

I. *Loudoun County, Virginia*: While PES data are unavailable, the percentage which was minority in 1990 was only 12.4%, therefore the County's relative state share is likely to place it in a disadvantageous position with respect to other counties in the state which have a larger proportion

of minority population. Thus, it is likely that residents of Loudoun County will suffer vote dilution in state and local elections.

C. Loss Of Federal And State Aid

29. The County Plaintiffs will be injured by the Department's Plan. I calculated:

A. *Delaware County, Pennsylvania*: State Share would decrease from 4.609% to 4.574%, a Shift in Share of -.035 relative to other counties in the state, or a Local Differential of -0.77%, the actual reduction of resources for the county resulting from adjustment. For each million dollars of state aid distributed on the basis of population criteria the local loss would be $7,700. National Share would decrease from 0.220197% to 0.215684%, a Shift in Share of -.004513 relative to other counties in the nation, or a Local Differential of -2.05%, the actual reduction of resources for the county resulting from adjustment. For each million dollars of federal aid distributed on the basis of population criteria the local loss would be $20,500. By way of example, Delaware County's Shift in National Share of -.004513 would translate into a loss to the county of $45,130 per billion dollars of aid distributed by the federal government for one year. Delaware County's Local Differential of -2.05% of federal aid, with direct population-based federal aid of $5,768,000 would translate into a loss to the county of $118,000 for one year.

B. *DuPage County, Illinois*: State Share will decrease from 6.838% to 6.799%, a Shift in Share of -.039 relative to other counties in the state, or a Local Differential of -0.57%, the actual reduction of

resources for the county resulting from adjustment. For each million dollars of state aid distributed on the basis of population criteria the local loss would be $570. National Share would decrease from 0.314288% to 0.310611%, a Shift in Share of -.004513 relative to other counties in the nation, or a Local Differential of -1.17%, the actual reduction of resources for the county resulting from adjustment. For each million dollars of federal aid distributed on the basis of population criteria the local loss would be $1,170.

30. The Shift in Share percentages, when translated into dollars received in federal or state aid, can reach a significant sum. Further, when extended out over the entire decade for which the census data will be used to calculate formulae for allocating funds, the significance in the shift is greatly increased.

D. Failure To Timely Apportion

31. As note above, the Department does not intend to conduct a complete traditional enumeration in connection with the implementation of its plan. Rather, it intends to deliberately omit 10% of the population from its actual head count. Thus, after the completion of the Department's Plan, there will not be any population figures based on a complete head count. Thus, federal and state governments will be forced to continue to utilize the population numbers reported in the 1990 census. Given the indisputable fact there is substantial variation in growth rates between counties and states, such continued reliance on the 1990 census result will cause severe malapportionment in federal and state elections and could change the congressional representation of the states in which plaintiffs reside.

32. To illustrate the magnitude of this problem, I have examined population growth for all congressional districts established following the 1980 census by reviewing the population growth for these districts reported in the 1990 census. *See* Commerce News, CB91-182, May 15, 1991. Plaintiffs and counties in states and congressional districts which have experienced higher than average population growth will be harmed by the use of 1990 population numbers to allocate Federal aid to the states and by the use of districting plans that are over a decade old in the 2002 elections. For example, population growth between 1980 and 1990 exhibited a national growth rate of 9.8 percent. However, 158 districts, or 36 percent of the 435 districts had grown at more than national rate. The number of districts which had grown at more than twice the national rate, that is 20 percent or more, was 89 districts, or about 20 percent of the 435 districts. There were 332 districts which experienced a net population gain and a 103 districts which had a net population loss over the decade. Of those losing population, 14 districts lost more than ten percent of their 1980 population over the decade. Of course, the distribution of population growth was uneven. For example in Georgia, which as a state had an 18.6 percent growth rate during the 1980's, nine of the ten districts had a net gain in population. The only district with a net loss of population was the Atlanta district, which lost 1.8 percent over its 1980 population. The range across the nation in the change in the population size of Congressional districts was a negative 23.2 percent at the low end and a high of 86.3 percent. In the 1980s, the fastest growing Congressional district in Georgia increased by about 40.8 percent and the fastest

increasing Congressional district in California grew by about 86.3 percent.

33. Any delay in the implementation of a valid census could change the congressional representation of the state of Georgia. It is virtually certain that Georgia will receive an additional seat in 2000 irrespective of whether apportionment is based on a traditional enumeration of the Department's Plan. To test the strength of this assertion, I held the population for Georgia constant while extending the most current reported population growth rate for all other states, as reported for 1996-1997, to 2000. This test demonstrated that, even if Georgia experienced no additional population growth for the remainder of the decade and all other states continued to grow at the same rate, Georgia would still receive an additional seat in 2000, going from 11 to 12 seats.

34. Similarly, using population estimated data published by the Census Bureau since 1990, one can calculate population increases for the nation as a whole, as well as for states, and for counties, to determine the effect on respective jurisdictions that would be caused by a delay in the collection and dissemination of the 2000 Census data. For example, using 1997 (CO-97-1) Estimates of the Population of Counties, Cobb County, Georgia has already increased by an estimated 23.1 percent, compared to a growth rate for the state of Georgia of about 15.6 percent and a national growth rate of just 7.6 percent. Cobb County was 6.92% of the state of Georgia based upon the 1990 Census (unadjusted). Based upon the latest 1997 county-level estimates from the Department, the county's share of the state has increased to 7.361%, an increase in state share of .449%. Cobb County's national share has also

increased since 1990. Thus, Cobb County will receive additional federal and state aid if a lawful census is conducted in the year 2000. Any delay in the completion of a lawful census will directly harm Cobb County by causing it to receive fewer federal funds than it is entitled to under either a traditional enumeration or the Department's Plan. This injury will be suffered by Cobb County solely by virtue of the Department's failure to conduct a lawful census in a timely manner.

35. In a similar fashion, plaintiffs in Loudoun County, Virginia, and Forsyth County, Georgia, will be adversely affected by any delay in the implementation of a valid census for 2000. Loudoun County, Virginia, has already grown at an estimated 55.0 percent since 1990, more than six times the rate of growth of the state as a whole, which is only 8.8 percent. Loudoun County was 1.392% of the Commonwealth of Virginia based upon the 1990 Census (unadjusted). Based upon the latest 1997 county-level estimates from the Department, the county's share of the state has increased to 1.982%, an increase in State Share of .591. Forsyth County, Georgia, has already grown 71.8 percent since 1990, more than four times as fast as the growth of the state as a whole. Forsyth County was .680% of the state of Georgia based upon the 1990 Census (unadjusted). Based upon the latest 1997 county-level estimates from the Department, the county's share of the state has increased to 1.012%, an increase in State Share of .331.

36. If the population information reported for the 2000 census is invalidated because the methodology used is determined to be unlawful, inaccurate or unconstitutional, the best available population information

remaining would be population numbers reported for the 1990 census. Clearly, the 1990 population numbers for states, counties, and other levels of political geography do not reflect population growth that has occurred in the last decade. Additionally, allocation of federal funding to states, counties, and municipalities cannot be fairly distributed on the basis of current population data. Therefore, until a new census is conducted, the loss of political representation in Congress and in state legislative district levels, as well as inequitable allocation of funding, would result if the 1990 population information was the best available data for allocating federal aid or apportioning representation following the year 2000 and until a new census could be completed.

37. The Department's Plan will not be more accurate than a traditional enumeration. The Riche Report makes this clear. After the mail out returns have been analyzed, the Department will select a random sample of nonresponse households who will be contacted as part of the nonresponse follow-up procedure. This sample will be large enough so that the Department will be able to physically count 90% of the population. The Department's Plan rests on the assumption that it will be able to count every person in the random sample. Thus, utilizing these same techniques for the 10% of the population that was not randomly selected, the Department would be able to count each of these persons if it were willing to devote sufficient resources to conducting an actual head count.

38. The Department has stressed the importance of states and districts as being important benchmarks for analysis of census data. However, as a professional who has been involved as a consultant in reviewing many

redistricting plans for compliance with the requisites of the Voting Rights Act, I can state that the census block is the building block for all districts, just as it is the basic reporting level for the entire census. Those responsible for drawing district lines use these data in assessing the demographic composition of all districts. Redistricting is not a random process and blocks are deliberately chosen because of their demographics. Errors which exist at the census block level will be magnified when aggregated to the level of a federal Congressional district, a state legislative district, a county board district, a city council district, or a local school board district.

III. Conclusions

39. On the basis of the foregoing findings, I conclude the following:

A. It is virtually certain that the state of Indiana will lose a seat in the House of Representatives because of the Department's Plan.

B. It is substantially likely that the state of Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, or Wisconsin will lose a seat in the House of Representatives because of the Department's Plan.

C. It is substantially likely that voters in Maricopa County, Arizona, Bergen County, New Jersey, Cumberland County, Pennsylvania, LaSalle County, Illinois, Orange County, California, St. Johns County, Florida, Gallatin County, Montana, Forsyth County, Georgia, and Loudoun County,

Virginia, will suffer vote dilution in state and local elections as a result of the Department's Plan.

D. It is virtually certain that Delaware County, Pennsylvania, and DuPage County, Illinois will receive less federal aid because of the Department's Plan.

E. After the Department's Plan has been implemented, an actual head count of the entire population will not have been conducted. Rather, the Department's Plan will deliberately omit 10% of the population from the actual head count. Thus, after the completion of the Department's Plan, there will be no better information as to the effect of the Plan as compared to an actual head count than is currently available.

F. If the Department's Plan is implemented and it is subsequently invalidated, it will be impossible for the Department or the states to conduct a lawful actual enumeration of the population prior to state and federal elections in 2001 and 2002.

G. Irrespective of whether congressional apportionment is based on the Department's Plan or a traditional enumeration, it is virtually certain that the state of Georgia will receive at least one additional seat in the House of Representatives after the completion of a census in the year 2000. Accordingly, if a lawful census is not completed prior to the 2002 elections, residents of the state of Georgia will suffer vote dilution in the elections for the Members of the House of Representatives solely by virtue of the Department's failure to conduct a census in a lawful and timely manner.

H. Forsyth County, Georgia has grown approximately 71% in population since 1990, as compared to state-wide population growth in Georgia of 15.6% during that time. Loudoun County, Virginia has grown at a rate of 55% since 1990, as compared to state-wide population growth in Virginia of 8.8% during that time. If a lawful census is not completed prior to state-wide elections in Virginia in 2001 and state elections in Georgia in 2002, residents of these counties will suffer vote dilution solely by virtue of the Department's failure to conduct a lawful census in a timely manner.

I. Cobb County, Georgia has grown at a rate of 23.1% since 1990, compared to a growth rate for the state of Georgia of about 15.6% and a national growth rate of 7.6%. If a lawful census is completed in the year 2000, Cobb County will receive an increase in federal funds over the level of aid it currently receives under the 1990 census numbers. Thus, the Department's failure to conduct a lawful census in a timely fashion will cause Cobb County, Georgia to receive fewer federal funds than it would otherwise receive, irrespective of the method used to conduct the census.

State of Pennsylvania:

County of Delaware:

AFFIDAVIT OF THOMAS H. KILLION

Personally appeared before the undersigned officer duly authorized to administer oaths, THOMAS H. KILLION, who, being sworn, deposes and states under oath as follows:

1.

My name is Thomas H. Killion. I am the elected Chairman of the County Council of Delaware County, Pennsylvania. I am competent to make this oath as to the facts contained herein, and all such facts are made upon my personal knowledge.

2.

The following are Delaware County programs funded by federal grants in fiscal year 1998 for which population is a determining factor when calculating the grant award amount:

(A) Direct federal grants to the County

COMMUNITY DEVELOPMENT BLOCK GRANT Pursuant to Title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C. §5301 et seq.)	4,557,000.
PENNSYLVANIA URBAN COUNTY CONSORTIUM -HOME PROGRAM Pursuant to Home Investment Partnership Act (42 U.S.C. 12701 et.seq.)	1,035,000.

DELAWARE COUNTY EMERGENCY SHELTER GRANT Pursuant to Subtitle B of Title IIV of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. 11301, as amended.	176,000.

(B) Indirect federal grants to the County:

TITLE III GRANT Pursuant to the Older Americans Act of 1965, 42 U.S.C.A. §3022-30.	1,094,845.
TITLE V GRANT Pursuant to the Older Americans Act of 1965, 42 U.S.C.A. §3065d.	143,080.
SOCIAL SERVICES BLOCK GRANT Pursuant to the Social Security Act, Subchapter XX 42 U.S.C.A. §1397(a and b)	477,406.
TOTAL FEDERAL FUNDS GRANTED FOR 1998	$7,483,331.

3.

Because grants under the listed federal programs are allocated on the basis of relative population for counties reported in the decennial census, Delaware County will be in danger of receiving a reduced share of funding from these programs if the population of Delaware County is proportionately reduced relative to the populations of other counties in the State of Pennsylvania and nationally, as a result of statistical adjustments made under the Census 2000 Plan.

FURTHER AFFIANT SAYETH NOT.

THIS 1ST DAY OF MAY, 1998

/s/ THOMAS H. KILLION
THOMAS H. KILLION
Chairman of County Council

Sworn to and subscribed
before me this 1st day
of May, 1998

/s/ DENISE M. LATCH
Notarial Seal Notary Public

Denise M. Latch, Notary Public
Media Boro, Delaware County
My Commission Expires Oct. 28, 2000

AFFIDAVIT OF GEORGE KOUBA

Affiant having been duly sworn, state the following:

I am the Director of the Finance Department of DuPage County, Illinois and my duties as the chief financial officer of the County include establishing and processing the financial records of the County.

Based on the review of the records kept by the Finance Department, the following is a Schedule of Grants, current for March 1998 and lists DuPage County programs and total program Budget costs. Some of the grants listed herein include federal and state grants for which the population of the County is a determining factor in the calculation the amount received.

Department Name	Total Program Budget Costs
Home Bound Detention Program 98	$ 50,000
Family Self-Sufficiency 96-97	$ 185,000
Community Alternative Planning Project 2nd Year	$ 122,500
COPS MORE	$ 490,802
Domestic Violence WoodDale	$ 20,000
Local Law Enforcement Block PY97	$ 30,186
IEMA-Hazard Mitigation Program	$8,515,047
IDOT Alcohol Incentive PY97	$ 112,941
B.A.T.T.L.E. 5th Year Funding	$ 372,658
Illinois Clean & Beautiful FY98	$ 8,450
B.A.T.T.L.E. 6th Year Funding	$ 373,083
Welfare to Work	$ 156,232
Violent Crime Victims Assistance Act 97-98	$ 21,699
CSBG Families Building Futures Flexible Fund	$ 75,000

III Home Weatherization Assistance Program	$ 297,946
Low Income Energy Assistance Program PY98	$ 838,035
CSBG FY98	$ 331,268
1998 State Supplemental Energy Assistance	$ 413,104
Welfare to Work Job Advantage	$ 233,622
Twenty Fourth Year Comm. Devel. Block	$9,264,656
7th Year Home Investment Partnership Program	$5,481,949
JTPA, One Stop Career Center Implementation	$ 537,931
JTPA, Title III Natn'l Reserve Flood	$ 249, 976
JTPA, U.I. Profiling Retaining PY97	$ 86,694
JTPA, Central Costs PY97	$ 615,726
JTPA, Title 2A PY97	$ 579,358
JTPA, Title 2C PY97	$ 203,641
JTPA, Title 2O PY97	$ 41,595
JTPA, Title 3A PY97	$1,019,921
JTPA, Title 3G PY97	$ 226,118
JTPA, Central Costs PY98	$ 72,118
JTPA, Summer Youth PY98	$ 606,894
JTPA, Tech Assistance Program	$ 25,000
Case Coordination Unit PY98	$ 824,098
Tenant Based Rental Assistance Program PY96	$ 100,000
Housing Resource Program 23rd Yr.	$ 169,923
ESG-Prevention of Homelessness PY97	$ 32,400
S. Hinsdale NRC Project-DPP	$ 21,880

Supportive Services	$ 124,775
Housing Resources 24th Year	$ 158,291
Title IV-D Program FY98	$ 514,626
Supportive Services FY98	$ 99,000
Victims of Crime Act 96-97	$ 17,813
MJC Drug Prosecution Program FY97	$ 240,884
Sex Offender Probation Program	$ 118,259

3 **Further, Affiant Sayeth Not.**

/s/ GEORGE K. KOUBA
GEORGE KOUBA

Subscribed and sworn to before me
on May 1, 1998

/s/ IRENE A. O'HERN
Notary

"OFFICIAL SEAL"
ARLENE A. O'HERN
Notary Public, State of Illinois
My Commission Expires 08/04/99

STATE OF GEORGIA

COUNTY OF COBB

AFFIDAVIT OF WILLIAM J. BYRNE

Personally appeared before the undersigned officer duly authorized to administer oaths, WILLIAM J. BYRNE, who, being sworn, deposes and states under oath as follows:

1.

My name is William J. Byrne. I am elected Chairman of the Board of Commissioners of Cobb County, Georgia. I am competent to make this oath as to the facts contained herein, and all such facts are made upon my personal knowledge.

2.

The following are Cobb County programs funded by federal grants in fiscal year 1998 for which population is a determining factor when calculating the grant award amount:

(A) Direct federal grants to the County:

COBB & MARIETTA COMMUNITY DEVELOPMENT BLOCK GRANT Pursuant to Title I of the Housing and CommunityDevelopment Act of 1974, as amended (42 U.S.C. §5301 et seq.).	$3,481,000

GEORGIA URBAN COMMUNITY CONSORTIUM-HOME PROGRAM Pursuant to Home Investment Partnerships Act (42 U.S.C. 12701 et. seq.).	3,448,000
COBB EMERGENCY SHELTER GRANT Pursuant to Subtitle B of Title IIV of the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. 11301, as amended.	112,000

(B) Indirect federal grants to the County:

TITLE III GRANT (THROUGH ATLANTA REGIONAL COMMISSION (ARC)) Pursuant to the Older Americans Act of 1965. 42 U.S.C.A. §3022-30.	316,062
TITLE V GRANT (THROUGH ATLANTA REGIONAL COMMISSION (ARC)) Pursuant to the Older Americans Act of 1965, 42 U.S.C.A. §3056d.	31,099
SOCIAL SERVICES BLOCK GRANT - (THROUGH ATLANTA REGIONAL COMMISSION (ARC)) Pursuant to the Social Security Act, Subchapter XX. 42 U.S.C.A. §1397(a and b).	310,819
TOTAL FEDERAL FUNDS GRANTED FOR 1998	$7,698,980

3.

Because grants under the listed federal programs are allocated on the basis of relative populations for counties reported in the decennial census, Cobb County will be in danger of receiving a reduced share of funding from these programs if the population of Cobb County is proportionately reduced relative to the populations of other counties in the State of Georgia and nationally, as a result of statistical adjustments made under Census 2000 Plan.

FURTHER AFFIANT SAYETH NOT.

THIS 20TH DAY OF APRIL, 1998

/s/ WILLIAM J. BYRNE
WILLIAM J. BYRNE

Sworn to and subscribed
before me this 20th
day of April, 1998.

/s/LYNNE S. PARSON
NOTARY PUBLIC

NOTARY PUBLIC, COBB COUNTY GEORGIA
My Commission Expires December 1, 2001

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Washington, D.C. 20006

David H. Thompson (202) 822-8950
(202) 822-8959 Fax (202) 822-8966

May 11, 1998

Michael Sitcov, Esq.
Federal Programs Branch
U.S. Department of Justice
Civil Division
Washington, D.C. 30530

Re: Glavin et al. v. Clinton et al., District Court for the Eastern District of Virginia, Civil Action File No. 98-207-A

Dear Mike:

This letter responds to yours of May 8, 1998, and our telephone conversation of even date regarding the affidavit of Dr. Ronald E. Weber, submitted in support of Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss in the referenced matter. The following is intended to respond to your request for clarification of the methodology used by Dr. Weber in reaching the conclusions stated in his affidavit.

First, you are correct in understanding that, to reach the population projections for each state, Dr. Weber multiplied the "preferred series" population projections for each state for 2000 (as issued by the Bureau in its

PPL-47 report) by the 1992 revised undercount rate for that state, as listed in the CAPE report.[1] You are also correct that Dr. Weber used the 2000 projections from PPL-47 as the basis for his calculations for the population in 2000 when based on a traditional enumeration.

Second, with respect to calculations described in Paragraph 16 of Dr. Weber's affidavit, the National Undercount Rate was not used as a factor in calculating apportionment. As stated in that paragraph, Dr. Weber assumed that the adjustment factors for 2000 are substantially similar to those stated in the 1990 PES, as revised in July 1992. As you are aware, the Bureau has issued multiple releases of the calculations of the Net Undercount Rate for 1990; therefore, the national rate was cited to clarify any existing confusion resulting from these multiple releases.

Finally, Dr. Weber confirms that he used 1990 census data and the revised 1992 PES Net Undercount Rates, and not projections for 2000, in calculating "Shift in Shares" for states and counties.

We trust that the foregoing is responsive to your request for clarification. Please do not hesitate to contact us if you have further questions or if we can

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[1] Technically, a reciprocal factor of the Net Undercount Rate is the adjustment multiplier. Thus, for Connecticut:

1. Projection from PPL-47	3,284,142
2. Net Undercount Rate	0.641
3. Adjustment Multiplier	0.006451
4. Net Adjustment	21,186
5. Total Adjusted Population	3,305,328

provide you with further information regarding the methodology used in the affidavit.

Sincerely,

/s/ DAVID H. THOMPSON
DAVID H. THOMPSON

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action File No. 98-207-A

(Three-Judge Court)
(HEW, CMH, RAJ)

GLAVIN, ET AL., PLAINTIFFS

v.

CLINTON, ET AL., DEFENDANTS

DECLARATION OF SIGNE I. WETROGAN

I Signe I. Wetrogan declare as follows:

1. I am the Assistant Division Chief for Population Estimates and Projections at the United States Bureau of the Census. I have personal knowledge of all facts stated herein. I am making this declaration in response to the affidavit of Dr. Ronald E. Weber in the above-referenced lawsuit.

2. I obtained my Bachelors Degree in Sociology from the University of Maryland in 1967 and completed work on my Masters Degree in Demography at Georgetown University in 1984. I have been employed by the Census Bureau since 1967 and have worked on population estimates and projections for my entire professional career. I was promoted to my present position, Assistant Division Chief for Population Estimates and Projections, in September, 1997. A copy of my CV, listing my professional articles and affiliations, is attached as Exhibit 1.

3. Dr. Weber's conclusions with regard to the effects of using sampling in Census 2000 rest on two incorrect assumptions: First, Dr. Weber assumes that the Census Bureau's 2000 projections as published in PPL-47 exactly predict the size and distribution of the population in the year 2000. Second, Dr. Weber assumes that the net undercount rate will be the same on a state-by-state basis in 2000 as it was in 1990. My colleague in the Decennial Division, John Thompson, will address the second assumption in his declaration, the assumption that one can confidently predict the results of a sampling versus a non-sampling census in 2000. I address Dr. Weber's first assumption herein, the assumption that the Census Bureau has exactly predicted the size and distribution of the population in 2000. Not only has the Census Bureau not exactly predicted these numbers, but I conclude that no one can predict the state-by-state population of the United States as of April 1, 2000 with the exactitude required by the Method of Equal Proportions.

An Explanation of Estimates and Projections

4. As background, let me provide a basic explanation of how the Population Division of the Census Bureau prepares both estimates and projections of the population. The difference between an estimate and a projection is that an estimate refers to the past, while a projection refers to the future. Estimates use a variety of existing sources to come to a reasoned conclusion about the population of a given governmental unit at some specified point in the past, while population projections make assumptions about which demographic trends will continue in the future. Our popula-

tion estimates are built with administrative records; they are based on birth and death records, and tax return data, among other sources. Projections use the latest available national and state estimates as the starting point, and then project the population in the future based on assumptions about fertility, mortality and internal and international migration trends.

5. The Census Bureau prepares annual population estimates by age, sex, race, and Hispanic origin for the nation, states, and counties in the United States. Every other year we prepare population estimates for the sub-county level, for all functioning governmental units. The population estimates which we released in March, 1998 are the most recent population estimates down to the county level as of July 1, 1997.

6. The Census Bureau prepares projections of the national and state populations on a periodic but irregular basis. We have published state population projections through the year 2025. The Bureau does not update its published projections every year after releasing updated estimates. Dr. Weber relied upon our most recent published population projections contained in the publication PPL-47, which was released in October, 1996.

7. The data set on which Dr. Weber premises his work, PPL-47, contains three sets of state projections, the preferred or "A" series used by Dr. Weber, and the "B" and "C" series. The "A" series is based on a time series model of state-to-state migration while the "B" series is based on employment projections. The "C" series lists population projections prepared by individual states. While the specifics vary, the Census Bureau generally follows this format and publishes a variety of

different series of population projections in one publication. The Bureau began to identify one of those series as preferred in 1994 in order to provide more guidance to naive users. Sophisticated users of Census Bureau data will typically use a variety of population projections, depending on the use of data; unsophisticated users are aided by being pointed to a preferred series.

8. PPL-47 is replete with disclaimers and explanations as to the number and variability of assumptions involved in population projections. The Census Bureau describes the preferred series thusly:

> Users are likely to choose the demographic series—the time series—due to the series stability, long-term inertia, and no need for economic assumptions. However, there is no definitive set of projections and the economic model is an alternative. Given the sensitivity of internal migration to changes in economic conditions, internal migration changes can be rapid and sizable. Identifying a preferred series along with an alternative series, reflects a process of evaluating State population projection models used in previous Census Bureau State population projections. (P.6)

Even two years ago, when PPL-47 was published, there were a number of alternative, equally valid ways that the Census Bureau could have predicted state population totals for 2000.

Dr. Weber Used Outdated Data

9. The most obvious problem with Dr. Weber's conclusions is that the data he used, the data in PPL-47, is outdated. PPL-47 was published in 1996 and is based on the Census Bureau's July 1, 1994 estimates. To prepare better projections of the state population in the

year 2000, he should have factored in the 1997 estimates, thus incorporating three additional years of data. Dr. Weber based his projection of a non-sampling census on data available through 1994, totally ignoring significant information on births, deaths, and internal and external migration during the 1994-1997 time period. Many statisticians outside the Census Bureau can and do use the yearly estimates to prepare population projections, using the most recent available data.

10. Had Dr. Weber incorporated the 1997 estimates into his projections he would have produced very different results. Significant population shifts among states occurred in the 1994-1997 time period that would have significantly changed Dr. Weber's projections. Some of the significant changes overlooked by Dr. Weber in the 1994-1997 time period include a sizeable increase in California's population, as that State pulled out of an economic downturn, and the shift in population trends in the New England states.

No One Can Predict Now the Exact Population on April 1, 2000

11. By saying that Dr. Weber used outdated and incomplete information to prepare his projections I do not mean to imply that there **are** numbers that Dr. Weber or anyone else could have used to prepare exact projections for the year 2000. The most important point I wish to make in this Declaration is that projections are inherently imprecise and subject to change. Projections are useful planning tools but they are not exact. As discussed above, significant population change occurred in the 1994-1997 time period. These trends could continue at the same rate in the 1997-2000 time period, they could halt, or they could accelerate. Wholly different migration trends could develop. The Census

Bureau prepares projections for planning purposes but it cannot predict exact population totals.

12. The Census Bureau's published population projections are used for a number of different purposes by a number of different entities. To mention only a few of the uses, the data are used in economic planning, capital infrastructure planning and social services planning. In planning where to locate a road or a hospital, or whether to stem an out-migration trend by increasing tax incentives to businesses, exact numbers are not needed. A state which wishes to stem out-migration doesn't need to know whether 300,000 or only 200,000 persons moved out of the state in the past five years. The method of equal proportions, in contrast, requires exact numbers. The formula is very sensitive and, as Dr. Weber notes, a difference of even a single person can move a House seat from one state to another. (Weber Affidavit, para. 22) No one can predict state populations three years from now with the exactitude required by the method of equal proportions.

Indiana is not "Virtually Certain" to Lose a Seat If Sampling is Used

13. Dr. Weber's statement that "it is a virtual certainty that Indiana will lose a seat" under a sampling plan is of dubious credibility (Weber Affidavit, para. 21). As explained earlier, I do not feel anyone can predict the 2000 state populations exactly at this time. However, we do know that we now estimate Indiana's population for 1997 to have been significantly below our projection for 1997 in PPL-47. We have produced eight different projections of Indiana's population in 2000 using the assumptions described on Exhibit 2 hereto. In each of these eight projections Indiana's population total would be at least 42,000 people less than was

projected in PPL-47. Given the sensitivity of the Method of Equal Proportions, a population difference of this magnitude could be more than sufficient to move a state from just below the breakpoint for the 435th seat to just above it. These numbers are projections that do not take into account the effects of using sampling in Census 2000 and reflect only the shift in relative population since the 1994 information used by Dr. Weber.

An Illustration—Looking at 1990 Based on 1988 Projections

14. To illustrate the volatile nature of population growth and the limitations of population projections, one need only look at the experience in the last decennial. Just as we are now two years before the next decennial, one can examine whether the 1988 projections would have accurately predicted the 2000 apportionment results. I have examined the state population projections that the Census Bureau released in October, 1988. These projections (Current Population Reports, Series P-25, No. 1017) were based on population estimates as of July 1, 1986. The 1988 projections, when compared to the 1990 actuality, show two states in particular having extraordinary population discrepancies. Texas was counted as having 725,665 fewer individuals in 2000 than had been projected and California was counted as having 659,857 more individuals. Without a doubt these differences are large enough to move House seats. Note that these projections were made two years closer to the census year than the projections on which Dr. Weber relied. Just as the 1988 projections did not accurately predict apportionment in the 1990 census, neither can the currently available numbers be used to predict apportionment after the

2000 census. I declare under penalty of perjury that the foregoing is true and correct.

May 22, 1998 /s/ SIGNE I. WETROGAN
DATE SIGNE I. WETROGAN
Assistant Division Chief
for Population
Estimates and Projections
United States Bureau
of the Census

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action File No. 98-207-A

(Three-Judge Court)
(HEW, CMH, RAJ)

GLAVIN, ET AL., PLAINTIFFS

v.

CLINTON, ET AL., DEFENDANTS

DECLARATION OF JOHN H. THOMPSON

I John H. Thompson declare as follows:

1. I am the Associate Director for the Decennial Census at the United States Bureau of the Census. I have personal knowledge of all facts stated herein. I am making this declaration in response to the affidavit of Dr. Ronald E. Weber in the above-referenced lawsuit.

2. I obtained my Bachelors degree in Mathematics from Virginia Polytechnic Institute and State University in 1973 and my Masters Degree in Mathematics from the same institution in 1975. Additionally, I have completed extensive post-graduate course work in statistics at George Washington University. I am currently the Associate Director for the Decennial Census and as such am the primary Census Bureau employee in charge of activities relating to the planning for and conduct of Census 2000. I have been continuously employed by the Census Bureau since 1975 and have

worked in the decennial area since coming to work for the Census Bureau.

3. Dr. Weber's conclusions with regard to the effects of using sampling in Census 2000 rest on two assumptions: Dr. Weber assumes that the Census Bureau's 2000 projections, as published in PPL-47, exactly predict the size and distribution of the population in the year 2000, and he assumes that the effect of the Integrated Coverage Measurement (ICM) operation on the count in 2000 will exactly equal the 1990 Post Enumeration Survey (PES) undercount rates. My colleague in the Population Division, Signe Wetrogan, will address the first assumption in her declaration. I will address Dr. Weber's second assumption regarding the use of the 1990 Net Undercount Rate (NUR). Briefly, Dr. Weber's assumption that the state NURs will be replicated in 2000 is unsupportable.

4. Dr. Weber compares the 1990 Census with the 1990 Census PES data and uses this comparison as a basis for comparing the effect of the Census Bureau's plan for Census 2000 with a non-sampling census. This comparison is invalid because all Census Bureau plans for Census 2000, sampling and non-sampling, differ from the 1990 Census in the important ways discussed below. These differences will result in different NURs.

A non-sampling census in 2000 will not have the same degree of accuracy as the 1990 Census.

5. Dr. Weber incorrectly assumes that a non-sampling census in 2000 would look exactly like the 1990 Census. The Departments of Commerce, Justice, State, the Judiciary and Related Agencies Appropriation Act, 1998, directed the Census Bureau to "become prepared to implement a 2000 decennial census, without using

statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible." Pub. L. No. 105-119, § 209(j), 111 Stat. 2440, 2480-87.

6. In accordance with this direction, the Secretary of Commerce submitted to Congress in April, 1998 the "Status Report on Planning for a Decennial Census in Year 2000 without the use of Scientific Sampling". The Bureau is continuing to work on its alternative plan, a plan that will be different from the 1990 Census and that will be designed to achieve accuracy above 1990 levels. The Census Bureau will attempt in the alternative plan to correct 1990 methods that were subject to error and to introduce new methods that will increase accuracy. These efforts are described in the *Status Report.*

A sampling Census 2000 will not have the same accuracy as the 1990 Census, as adjusted with the PES.

7. There are a number of important differences between the Census Bureau's plan for Census 2000 and the 1990 Census, as adjusted by the PES. These differences are certain to result in different NURs because basic census design decisions affect the undercount rate. The Census Bureau set about re-engineering the decennial in the aftermath of the 1990 Census. The result of this re-engineering is a plan for Census 2000 which incorporates many innovations to increase response rates, promote awareness, reduce costs, and improve accuracy. This Plan includes the use of statistical sampling. Because the plan for Census 2000 differs from the 1990 Census in important aspects, one cannot simply assume that the 1990 data, adjusted or otherwise, will reflect the state of affairs in 2000.

8. I discuss below in paragraphs A-D four of the most important basic design decisions that will result in different NURs in 2000:

A. Master Address File. The Master Address File, or MAF, will be formed in a completely different fashion in 2000 than it was in 1990. In 1990 the Census Bureau created its address list, the basis for the mail-out, mail-back campaign, with purchased commercial address lists. Legislation passed after the 1990 census has permitted the Census Bureau to use the United States Postal Service address list as the basis for the MAF in Census 2000. A number of other improvements have been made to the MAF development process, none of which were used in 1990.

B. Paid Advertising. The Census Bureau has entered into a $100 million contract with an outside advertising agency to publicize the census and to encourage people to respond. Census 2000 will be the first decennial census to use paid advertising, to "blanket" the Nation with the message that it is important to send in your census questionnaire.

C. Multiple Ways to Respond. Unlike the 1990 Census, Census 2000 will offer multiple opportunities to respond. The Census Bureau has developed unduplication technology that will allow it, for the first time, to permit multiple methods of responding to the census. In 2000 the Census Bureau will establish Telephone Questionnaire Assis-

tance ("TQA") centers, where respondents can call the center and obtain help in filling out their form and respond by telephone if they so desire. Finally, the Be Counted campaign will make questionnaires available in public locations. In addition, the Census Bureau has developed a multiple mail strategy and has researched and developed a simplified and respondent-friendly questionnaire.

D. Coverage Improvement Programs. Finally, the Census Bureau has replaced the costly and error prone 1990 coverage improvement programs with the ICM. A variety of coverage improvement programs were used in 1990 to attempt to find and enumerate persons missed by previous activities. These programs were implemented after completion of non-response follow up. These programs included an additional follow-up for housing units initially believed to be vacant or non-existent, a follow-up of questionnaires that contained indications that not all individuals in the household were included and a special records check for parolees and probationers.

9. The methodologies discussed in A-D above will all affect accuracy in Census 2000. These changes in basic methodology, when used in conjunction with statistical sampling, will result in different NURs in 2000 than in 1990.

Because the non-sampling plan is not final, one cannot predict the resulting NURs.

10. Dr. Weber's assumption that it is reasonable to use the 1990 NURs to predict 2000 undercounts is further questionable because the Census Bureau's non-sampling plan is still in basic stages of development. It is sheer speculation to predict the resulting NUR of a plan that has yet to be finalized. The Secretary reported to Congress on the Census Bureau's progress in preparing for a non-sampling census in the *Status Report*. As described in that report, major design decisions for the non-sampling alternative remain to be made. Until these major design decisions are made, one cannot even begin to predict error in Census 2000. Additionally, while the basic structure of the plan for Census 2000 is in place, and is described in the *Report to Congress*, some details of the plan may be modified after the results of the on-going Dress Rehearsal are reviewed.

Dr. Weber Ignores PES Sampling Error.

11. As Dr. Weber correctly states, the 1990 Post Enumeration Survey, or PES, was a post census survey that estimated the undercount rate for the 1990 census. The Census Bureau believes that all decennial censuses thus far have undercounted the population. The PES quantified this undercount by using an established statistical method called Dual System Estimation. The 1990 PES estimates are, in fact, the best evidence at the sub-national level of the undercount in the 1990 Census. Like all survey estimates, however, the PES estimates have associated sampling error, otherwise known as standard error. Standard errors are measures of sampling error and are used to quantify the confidence interval about an estimate. A confidence

interval tells you in statistical terms how far an estimate could be from the truth.

12. Contrary to standard accepted statistical practice, Dr. Weber, has ignored the standard error associated with each state's NUR. I will illustrate, using the State of Indiana, which Dr. Weber erroneously states is "virtually certain" to lose a seat under the plan for Census 2000 (Weber Affidavit, para. 21). Indiana's 1990 NUR was 0.504% and its standard error was 0.399. This means that one can say with 90% confidence that Indiana's true undercount in 1990 was between -0.152% and 1.160%. (A 90% confidence interval is constructed by multiplying the standard error by 1.645 and then adding and subtracting the resulting number to the point estimate.) Dr. Weber, however, has not accounted for this range, focusing inappropriately on a single point estimate. Standard statistical practice would have accounted for sampling error in preparing such a projection. This would have indicated a much greater degree of uncertainty about the effects of sampling than his estimates suggest.

The Census Bureau Uses the 1990 NURs Properly

13. Dr. Weber correctly points out in his affidavit that the Census Bureau itself has used the 1990 PES data in planning for Census 2000. These data are descriptive of the problems with the 1990 enumeration and thus are important planning tools. The Census Bureau used the 1990 NUR to help it estimate expected error rates for Census 2000. These error projections are used to make conservative estimates of the national NUR, and are used in the form of averages or ranges, not fixed numbers. Dr. Weber, in contrast, is using the 1990 PES data to predict apportionment in 2000 by running the method of equal proportions. The

sensitivity of the method of equal proportions to small changes in relative population share between states is well known and is acknowledged by Dr. Weber himself, who states that "the last seat could literally be decided by the addition of one person". (Weber Affidavit, para. 22) Using the 1990 PES data to prepare conservative estimates is far different from using the numbers in a sensitive formula like the method of equal proportions.

Dr. Weber's Affidavit Contains a Number of Inaccuracies

14. Dr. Weber makes a number of inaccurate assertions in his affidavit. I will list the major inaccuracies below:

— Dr. Weber asserts that Census 2000 will be less accurate using the Bureau's plan than it would be were a traditional enumeration conducted. (Weber Affidavit, para. 37) This is not true. The Census Bureau has estimated that it can improve accuracy at the state level, the important level for Congressional apportionment, from 1.9% undercount to 0.5% error. *Report to Congress*, p. 44-45.

— Dr. Weber asserts that the Census Bureau could count 100% of the population were it "willing to devote sufficient resources". (Weber Affidavit, para. 37) The Census Bureau agrees with expert commentators who have concluded that traditional census-taking methods have never lead to a complete count and are increasingly unlikely to do so in the future. *See, Report to Congress*, p 5-6 and *Modernizing the U.S.*

Census, National Academy of Sciences, (1995) at 3 ("It is fruitless to continue trying to count every last person with traditional census methods of physical enumeration."). Additionally, both the Census Bureau and its outside observers are seriously concerned about the Bureau's ability to recruit, hire and train sufficient enumerators to conduct 100% nonresponse follow-up.

— Dr. Weber's statement that "errors which exist at the census block level will be magnified when aggregated to the level of a federal Congressional district" (Weber Affidavit, para. 38) is egregiously wrong. Elementary statistics teaches that a larger sample size will yield a smaller sampling error. While sampling error may be high at the block level under the plan for Census 2000, that error will drop dramatically once blocks are aggregated together to form any sort of meaningful representational unit. On the other hand, systematic bias (non-sampling error), as measured by the 1990 undercount, will not diminish as smaller areas are aggregated to larger ones.

— The Census Bureau is not going to "deliberately exclude 10% of the population". (Weber Affidavit, para. 9) As explained in the *Report to Congress*, pp. 26-29, the Census Bureau will go to extraordinary lengths to elicit voluntary responses from 100% of the population and sampling will be used only

to complete the nonresponse follow-up operation and as a quality check.

Dr. Weber's projections ignore overseas Americans.

15. My final contention with Dr. Weber's work is that Dr. Weber has failed to take into account overseas Americans in making his 2000 projections. The Census Bureau's population projections and estimates do not take the overseas Americans into account because this data was included only for apportionment purposes. The data on overseas Americans is public, however, and any statistician could have included it in his or her projections. Dr. Weber failed to do so. The history of the count of overseas Americans makes clear that a decision to include overseas Americans can and does affect apportionment. The Census Bureau included Department of Defense overseas employees in the official 1990 count based on their "home of record." This decision added an additional 922,819 individuals to the official count, shifted a seat from Massachusetts to Washington and culminated in a Supreme Court decision upholding the inclusion of overseas Americans. *Franklin v. Massachusetts*, 505 U.S. 788 (1992). The Census Bureau has recently decided that it will include overseas Americans again in the 2000 count. Clearly, overseas Americans have the potential to shift seats and a prediction that fails to take these individuals into account is not reliable.

I declare under penalty of perjury that the foregoing is true and correct.

5/22/98 /s/ JOHN H. THOMPSON
DATE JOHN H. THOMPSON
Associate Director
for Decennial Census

ASSESSMENT OF ACCURACY OF ADJUSTED VERSUS UNADJUSTED 1990 CENSUS BASE FOR USE IN INTERCENSAL ESTIMATES

REPORT OF THE COMMITTEE ON ADJUSTMENT OF POSTCENSAL ESTIMATES
BUREAU OF THE CENSUS
DEPARTMENT OF COMMERCE
AUGUST 7, 1992

RECOMMENDATION

* * * * *

ATTACHMENT 3A: PES ESTIMATES OF UNDERCOUNT BY RACE AND SEX
JULY, 1992

Table 1 Table of PES Estimates for Selected Race/Origin/Sex Groups

		JULY, 1991 Original PES		JANUARY, 1992 Revised PES		JULY, 1992 357 PES	
Race/Hispanic/Sex	Census	Estimate	Std. Error	Estimate	Std. Error	Estimate	Std. Error
Total	248709873	253979141	472946.472	252959473	461310.829	252712821	489754.395
Male	121239418	124249093	345445.426	123648997	238663.637	123623143	273518.304
Female	127470455	129730048	246737.086	129310476	241383.831	129089678	254912.175
Black	29986060	31505838	95339.460	31295058	93435.743	31377094	167925.028
Male	14170151	14974382	49052.934	14857391	47952.832	14900868	82912.806
Female	15815909	16531456	52914.183	16437667	51898.230	16476225	96609.126
Non-Black	218723813	222473303	424675.175	221664415	414933.642	221335728	453076.281
Male	107069267	109276711	222153.799	108791604	216160.510	108722274	249791.220
Female	111654546	113198592	220800.163	112672809	216539.374	112613453	239423.186
Asian or Pacific Islander	7273662	7504906	36264.289	7485602	35197.768	7447371	102828.516
Male	3558038	3688436	19879.800	3674532	19946.424	3686895	60817.829
Female	3715624	3816470	18469.115	3811069	18435.209	3762476	57240.421
American Indian	1878285	1976890	21726.014	1970537	21588.870	2051976	26259.820
Male	926056	980874	11312.232	977738	11302.066	1020059	13248.050
Female	952229	996016	10612.782	992799	10467.531	1031917	13252.678
Hispanic	22354059	23590274	103458.969	23471101	102033.676	23521183	180090.423
Male	11388059	12086513	57498.441	12008888	56356.003	12052241	114778.144
Female	10966000	11503761	52275.143	11462216	52082.441	11468942	84750.443

Table 2 Table of Undercount Rates for Selected Race/Origin/Sex Groups

		Original PES		Revised PES		357 PES	
Race/Hispanic/Sex	Census	UC Rt	SE(UC Rt)	UC Rt	SE(UC Rt)	UC Rt	SE(UC Rt)
Total	248709873	2.075	0.182	1.680	0.179	1.584	0.191
Male	121239418	2.422	0.193	1.949	0.189	1.928	0.217
Female	127470455	1.742	0.187	1.423	0.184	1.254	0.195
Black	29986060	4.824	0.289	4.183	0.287	4.433	0.511
Male	14170151	5.371	0.310	4.626	0.308	4.904	0.529
Female	15815909	4.328	0.306	3.783	0.304	4.008	0.563
Non-Black	218723813	1.685	0.188	1.327	0.185	1.180	0.202
Male	107069267	2.018	0.199	1.583	0.196	1.520	0.226
Female	111654546	1.364	0.192	1.079	0.190	0.852	0.211
Asian or Pacific Islander	7273662	3.081	0.468	2.831	0.469	2.332	1.369
Male	3558038	3.535	0.520	3.170	0.526	3.443	1.594
Female	3715624	2.642	0.471	2.504	0.472	1.245	1.502
American Indian	1878285	4.988	1.044	4.682	1.044	4.520	1.222
Male	926056	5.589	1.089	5.356	1.095	5.183	1.231
Female	952229	4.396	1.019	4.086	1.011	3.864	1.235
Hispanic	22354059	5.240	0.436	4.759	0.434	4.962	0.728
Male	11388059	5.779	0.448	5.170	0.445	5.511	0.900
Female	10966000	4.675	0.433	4.329	0.435	4.385	0.707

Note: Due to the nature of the data used to compute these counts for the 357 poststrata PES design, the American Indian counts in both Table 1 and Table 2 above include Eskimos and Aleuts for the 357 PES. The census count used for this group was 1,959,234. The census counts used to compute the original PES counts and the revised PES counts are shown in the tables.

ATTACHMENT 3B: REVISED PES ESTIMATES OF UNDERCOUNT BY AGE-RACE-SEX
JULY, 1992

Table 1 PES Estimates for Selected Race/Origin/Sex Groups for the 0 to 17 Age Group
(357 Poststrata PES Design)

		JULY, 1992			
Race/Origin/Sex Group	Census	357 PES Estimate	Std. Error	Undercount Rate	Standard Error
Total	63604432	65695382	191195.568	3.183	0.282
Male	32584278	33649795	97745.288	3.166	0.281
Female	31020154	32045587	93459.542	3.200	0.282
Black	9584415	10311019	95917.245	7.047	0.865
Male	4849497	5215800	48390.736	7.023	0.863
Female	4734918	5095218	47527.287	7.071	0.867
Non-Black	54020017	55384343	172067.616	2.463	0.303
Male	27734781	28433994	88325.776	2.459	0.303
Female	26285236	26950349	83724.989	2.468	0.303
Asian or Pacific Islander	2083387	2152880	46537.029	3.228	2.092
Male	1063264	1099038	23792.412	3.255	2.094
Female	1020123	1053842	22745.817	3.200	2.089
American Indian, Eskimo, or Aleut	694967	742996	12481.466	6.195	1.376
Male	354875	378205	6315.004	6.169	1.367
Female	342092	364791	6166.491	6.222	1.385
Hispanic	7757500	8166834	77292.661	4.989	0.899
Male	3971164	4179630	39531.088	4.988	0.899
Female	3786336	3985204	37742.086	4.990	0.900

Table 2 PES Estimates for Selected Race/Origin/Sex Groups for the 18 to 29 Age Group
(357 Poststrata PES Design)

		JULY, 1992			
Race/Origin/Sex Group	Census	357 PES Estimate	Std. Error	Undercount Rate	Standard Error
Total	48050811	49538134	192936.681	2.987	0.378
Male	24312055	25105214	129869.843	3.159	0.501
Female	23738756	24424918	113605.766	2.809	0.452
Black	6419397	6727151	60784.870	4.375	0.842
Male	3110320	3225832	38478.198	3.581	1.150
Female	3309077	3501319	41388.086	5.491	1.117
Non-Black	41631414	42802983	174778.637	2.737	0.397
Male	21201735	21879384	121313.350	3.097	0.537
Female	20429679	20923599	102738.356	2.361	0.479
Asian or Pacific Islander	1581231	1686549	47226.618	6.243	2.425
Male	802967	893983	35821.446	10.282	3.995
Female	778164	792566	31415.861	1.691	3.897
American Indian, Eskimo, or Aleut	414071	441408	7298.043	6.193	1.551
Male	210263	224725	4083.008	6.435	1.700
Female	203808	216683	3782.708	5.942	1.642
Hispanic	5525130	5903999	83906.191	6.417	1.330
Male	2984897	3207779	67903.944	6.948	1.970
Female	2540233	2696220	31412.026	5.785	1.098

ATTACHMENT 3B: REVISED PES ESTIMATES OF UNDERCOUNT BY AGE-RACE-SEX JULY, 1992

Table 3 PES Estimates for Selected Race/Origin/Sex Groups for the 30 to 49 Age Group (357 Poststrata PES Design)

July, 1992

Race/Origin/Sex Group	Census	357 PES Estimate	Std. Error	Undercount Rate	Standard Error
Total	73314363	76327349	178380.748	1.363	0.237
Male	36281757	36965692	114336.225	1.850	0.304
Female	37032606	37361657	94874.030	0.881	0.252
Black	8300318	8705762	57437.333	4.657	0.629
Male	3841762	4099633	38014.164	6.290	0.869
Female	4458556	4606129	31219.727	3.204	0.636
Non-Black	65014045	65621588	168451.681	0.926	0.254
Male	32439995	32866059	106016.209	1.296	0.318
Female	32574050	32755528	90532.426	0.554	0.273
Asian or Pacific Islander	2373785	2396349	35297.864	0.942	1.459
Male	1128527	1127367	23875.089	-0.085	2.119
Female	1245258	1268782	19001.048	1.854	1.470
American Indian, Eskimo, or Aleut	543821	560400	5746.845	2.958	0.995
Male	263525	276134	2812.700	4.566	0.972
Female	280296	284366	3232.422	1.397	1.121
Hispanic	5961207	6271153	61500.742	4.942	0.932
Male	3029043	3225477	40130.964	6.090	1.168
Female	2932164	3045676	33430.513	3.727	1.057

Table 4 PES Estimates for Selected Race/Origin/Sex Groups for the 50 and Older Age Group (357 Poststrata PES Design)

July, 1992

Race/Origin/Sex Group	Census	357 PES Estimate	Std. Error	Undercount Rate	Standard Error
Total	63740267	63159956	164191.819	-0.919	0.262
Male	28061328	27902440	91400.020	-0.569	0.329
Female	35678939	35257516	98573.330	-1.195	0.283
Black	5681930	5633162	34874.194	-0.866	0.624
Male	2368572	2359603	22227.003	-0.380	0.946
Female	3313358	3273559	19516.989	-1.216	0.603
Non-Black	58058337	57526794	159823.396	-0.924	0.280
Male	25692756	25542837	89232.535	-0.587	0.351
Female	32365581	31983957	96067.229	-1.193	0.304
Asian or Pacific Islander	1235259	1211593	20586.691	-1.953	1.732
Male	564180	564307	7192.919	0.023	1.274
Female	671079	647286	18017.833	-3.676	2.886
American Indian, Eskimo, or Aleut	304375	307172	3091.413	0.911	0.907
Male	138523	140996	1832.019	1.754	1.277
Female	165852	166176	1554.022	0.195	0.933
Hispanic	3110222	3181198	45726.253	2.231	1.405
Male	1402955	1439356	27996.289	2.529	1.896
Female	1707267	1741842	32679.612	1.985	1.839

ATTACHMENT 4:

JULY, 1992

State Level Estimates and Estimated Undercount Rates

State	1990 Census	Original PES July 1991 Estimate	UC Rt	SE(UCRt)	357 PES July 1992 Estimate	UC Rt	SE(UCRt)
01 Alabama	4040587	4146133	2.546	0.383	4113119	1.763	0.316
02 Alaska	550043	560727	1.905	0.437	561253	1.998	0.364
04 Arizona	3665228	3790186	3.297	0.466	3754297	2.373	0.455
05 Arkansas	2350725	2402925	2.172	0.417	2392291	1.738	0.337
06 California	29760021	30886075	3.652	0.420	30594537	2.728	0.379
08 Colorado	3294394	3376099	2.420	0.470	3363357	2.050	0.383
09 Connecticut	3287116	3305458	0.561	0.556	3308309	0.641	0.406
10 Delaware	666168	686661	2.984	0.437	678372	1.799	0.377
11 District of Columbia	606900	638747	4.986	0.517	628309	3.407	0.901
12 Florida	12937926	13277708	2.559	0.384	13196855	1.962	0.390
13 Georgia	6478216	6632561	2.327	0.368	6618829	2.124	0.331
15 Hawaii	1108229	1136417	2.480	0.337	1129162	1.854	0.808
16 Idaho	1006749	1035271	2.755	0.501	1029213	2.183	0.434
17 Illinois	11430602	11592305	1.395	0.352	11544433	0.986	0.358
18 Indiana	5544159	5585918	0.748	0.370	5572239	0.506	0.399
19 Iowa	2776755	2807238	1.086	0.455	2788378	0.417	0.404
20 Kansas	2477574	2506427	1.151	0.353	2494762	0.689	0.350
21 Kentucky	3685296	3767824	2.190	0.418	3745662	1.612	0.370
22 Louisiana	4219973	4332297	2.595	0.366	4313516	2.169	0.339
23 Maine	1227928	1240076	0.980	0.611	1237126	0.743	0.562
24 Maryland	4781468	4868990	1.798	0.444	4882324	2.066	0.418
25 Massachusetts	6016425	6039315	0.379	0.548	6045161	0.475	0.485
26 Michigan	9295297	9403964	1.156	0.368	9361331	0.705	0.371
27 Minnesota	4375099	4419180	0.998	0.355	4394680	0.446	0.380
28 Mississippi	2573216	2632412	2.249	0.397	2628899	2.118	0.434
29 Missouri	5117073	5184411	1.299	0.352	5149052	0.621	0.363
30 Montana	799065	822092	2.801	0.514	818305	2.351	0.492
31 Nebraska	1578385	1594894	1.035	0.380	1586698	0.649	0.366
32 Nevada	1201833	1231620	2.419	0.469	1230675	2.344	0.383
33 New Hampshire	1109252	1115972	0.602	0.530	1118610	0.837	0.544
34 New Jersey	7730188	7836174	1.353	0.498	7774411	0.569	0.612
35 New Mexico	1515069	1586489	4.502	0.514	1563123	3.074	0.505
36 New York	17990455	18304414	1.715	0.451	18261955	1.487	0.581
37 North Carolina	6628637	6814693	2.730	0.363	6753175	1.844	0.347
38 North Dakota	638800	647837	1.395	0.463	643042	0.660	0.502
39 Ohio	10847115	10933439	0.790	0.354	10921925	0.683	0.360
40 Oklahoma	3145585	3213646	2.118	0.386	3202730	1.784	0.338
41 Oregon	2842321	2898058	1.923	0.445	2896147	1.859	0.401
42 Pennsylvania	11881643	11956891	0.629	0.477	11916630	0.294	0.483
44 Rhode Island	1003464	1006158	0.267	0.556	1004811	0.134	0.590
45 South Carolina	3486703	3589808	2.872	0.407	3558918	2.029	0.362
46 South Dakota	696004	706954	1.549	0.494	702878	0.978	0.548
47 Tennessee	4877185	5012173	2.693	0.386	4963686	1.743	0.344
48 Texas	16986510	17550747	3.215	0.378	17469248	2.763	0.395
49 Utah	1722850	1757423	1.967	0.537	1753121	1.727	0.497
50 Vermont	562758	570651	1.383	0.709	569991	1.113	0.765
51 Virginia	6187358	6352705	2.603	0.351	6313620	2.000	0.353
53 Washington	4866692	4986607	2.405	0.433	4957987	1.841	0.437
54 West Virginia	1793477	1842267	2.648	0.436	1819004	1.403	0.430
55 Wisconsin	4891769	4923844	0.651	0.369	4921997	0.616	0.397
56 Wyoming	453588	466067	2.678	0.481	463569	2.153	0.416
United States Totals	248709873	253979148	2.075	0.182	252712822	1.584	0.191

UC Rt — Undercount Rate as estimated from the PES.

SE(UCRt) — The sampling error of the estimated undercount rate.

ATTACHMENT 5: THE 357 POSTSTRATUM DESIGN
FOR POSTCENSAL ESTIMATION--JULY, 1992

The following page defines the 51 poststrata groups and seven age sex groups used to poststratify the Post-Enumeration Survey (PES). These were used to develop dual system estimates for use in the postcensal estimation program. Cross classification of the 51 poststrata groups with the seven age sex groups yields 357 poststrata cells for which dual system estimates have been developed.

The following rough definitions are used:

"Urbanized area 250,000+" means that the PES sample block was part of an Urbanized Area the total population size of which was greater than 250,000.

"Other-urban" refers to all PES blocks that were part of an Urbanized Area not greater than 250,000 or were part of an other urban place.

"Non-urban" means all rural areas and other areas not falling into the above categories.

"Owner/Non-Owner" is determined from the tenure variable on the PES questionnaire. All persons in group quarters are non-owners by definition.

"Asian and Pacific Islander" refers to all people who report themselves as being Asian and Pacific Islander. This group is not restricted to the West or Mid Atlantic as it was in the July, 1991 estimates. Asians and Pacific Islanders of Hispanic origin are included here.

"American Indians on Reservations" include American Indians living on reservations and Tribal Trust Lands. All other concepts (Black, Non-black Hispanic, etc.) are defined as in the census.

"North East" states are Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont, New Jersey, New York, and Pennsylvania.

"South" states include Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia, Alabama, Kentucky, Mississippi, Tennessee, Arkansas, Louisiana, Oklahoma, and Texas.

"Midwest" states are Illinois, Indiana, Michigan, Ohio, Wisconsin, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

"West" states include Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Wyoming, Alaska, California, Hawaii, Oregon, and Washington.

(357 DESIGN) - 1992
Revised Post-Stratatification for Postcensal Estimation

Post-Strata Groups	North East	Mid West	South	West
Non-Hispanic White & Other				
Owner				
Urbanized Areas 250,000 +	1	2	3	4
Other Urban	5	6	7	8
Non-Urban	9	10	11	12
Non-owner				
Urbanized Areas 250,000 +	13	14	15	16
Other Urban	17	18	19	20
Non-Urban	21	22	23	24
Black				
Owner				
Urbanized Areas 250,000 +	25	26	27	28
Other Urban	29			
Non-Urban	30			
Non-owner				
Urbanized Areas 250,000 +	31	32	33	34
Other Urban	35			
Non-Urban	36			
Non-Black Hispanic				
Owner				
Urbanized Areas 250,000 +	37	38	39	40
Other Urban	41			
Non-Urban	42			
Non-owner				
Urbanized Areas 250,000 +	43	44	45	46
Other Urban	47			
Non-Urban	48			
Asian & Pacific Islander				
Owner	49			
Non-owner	50			
*American Indians on Reservations	51			

Age-Sex Groups

	Males	Females
0 to 17	g	
18 to 29	b	d
30 to 49	c	e
50 and Over	f	g

ATTACHMENT 6:

Total Error of the Net Undercount Rate Assuming No Correlation Bias and Synthetic Estimation of Net Component Errors

JULY, 1992

Evaluation Poststratum	Û*	B̂(Û)	St. Dev. B̂(Û)	Total St. Dev.	95% Interval
Non-Hispanic White and Other, Owner					
Urban 250k+	-0.50	0.32	0.99	1.06	(-2.95, 1.31)
Other Urban	0.11	0.21	0.25	0.34	(-0.79, 0.59)
Non-Urban	-0.22	0.86	0.87	1.00	(-3.07, 0.92)
Non-Hispanic White and Other, Non-Owner					
Urban 250k+	2.33	-0.06	0.60	0.96	(0.47, 4.32)
Other Urban	2.92	1.70	0.82	1.13	(-1.03, 3.47)
Non-Urban	5.30	0.47	0.74	1.35	(2.13, 7.53)
Black, Non-Black Hispanic, Asian and Pacific Islander, Urban 250k+					
Owner	1.33	0.84	0.44	0.67	(-0.86, 1.82)
Non-Owner	7.13	0.80	0.48	0.94	(4.44, 8.21)
Black, Non-Black Hispanic, Asian and Pacific Islander, Other Urban & Non-Urban					
Owner	2.07	2.38	0.90	1.25	(-2.81, 2.18)
Non-Owner	6.44	3.98	0.94	1.63	(-0.80, 5.72)
National	1.61	0.73	0.30	0.36	(0.17, 1.60)

*Based on PES population only.

Total Error of the Net Undercount Rate Assuming Synthetic Estimation of Net Component Errors

Evaluation Poststratum	Û*	B̂(Û)	St. Dev. B̂(Û)	Total St. Dev.	95% Interval
Non-Hispanic White and Other, Owner					
Urban 250k+	-0.50	0.31	0.99	1.06	(-2.94, 1.32)
Other Urban	0.11	0.18	0.25	0.34	(-0.76, 0.62)
Non-Urban	-0.22	0.81	0.88	1.00	(-3.03, 0.97)
Non-Hispanic White and Other, Non-Owner					
Urban 250k+	2.33	-0.68	0.76	1.07	(0.87, 5.16)
Other Urban	2.92	1.54	0.84	1.14	(-0.90, 3.65)
Non-Urban	5.30	-0.12	0.90	1.45	(2.52, 8.31)
Black, Non-Black Hispanic, Asian and Pacific Islander, Urban 250k+					
Owner	1.33	0.80	0.45	0.68	(-0.83, 1.87)
Non-Owner	7.13	-1.37	1.30	1.54	(5.42, 11.56)
Black, Non-Black Hispanic, Asian and Pacific Islander, Other Urban & Non-Urban					
Owner	2.07	2.23	0.95	1.28	(-2.71, 2.41)
Non-Owner	6.44	3.55	1.05	1.70	(-0.50, 6.28)
National	1.61	0.35	0.33	0.38	(0.50, 2.03)

*Based on PES population only.

ATTACHMENT 7: COMPARISON OF REVISED PES ESTIMATES VERSUS DA--JULY 1992

Comparison of the Census, Post Enumeration Survey (PES) and Demographic Analysis (DA) Estimates of Population and Percent Net Undercount: 1990

(A positive difference means that the demographic estimate is higher than the PES estimate; a negative difference means that the demographic estimate is lower).

Race, Sex, Age	PES Net Undercount				DA Net Undercount		Difference in DA and PES Percent Net Undercount	
	Original Estimates July 1991		Revised Estimates July 1992					
	Amount (1)	Percent (2)	Amount (3)	Percent (4)	Amount (5)	Percent (6)	Original PES 7=6-2	357 PES 8=6-4
TOTAL	5,269,267	2.07	4,002,947	1.58	4,683,913	1.85	-0.23	0.26
Male	3,009,674	2.42	2,383,724	1.93	3,480,216	2.79	0.37	0.86
Female	2,259,593	1.74	1,619,223	1.25	1,203,697	0.94	-0.81	-0.32
BLACK	1,519,776	4.82	1,391,033	4.43	1,836,272	5.68	0.86	1.25
Male	804,233	5.37	730,717	4.90	1,338,380	8.49	3.12	3.59
Female	715,543	4.33	660,316	4.01	497,892	3.01	-1.32	-1.00
NONBLACK	3,749,491	1.69	2,611,914	1.18	2,847,641	1.29	-0.40	0.11
Male	2,205,441	2.02	1,653,007	1.52	2,141;836	1.97	-0.05	0.45
Female	1,544,050	1.36	958,907	0.85	705,805	0.63	-0.73	-0.22

NOTE: Original PES estimates are the July 15, 1991 estimates based on 1392 poststrata and incorporate smoothing; revised PES estimates are the July 1992 estimates based on 357 poststrata, all PES revisions since July 1991, and no smoothing.

ATTACHMENT 10: ESTIMATED UNDERCOUNT/OVERCOUNT FOR 51 POST-STRATA, JULY 1992

Post-Strata Groups	Percent Undercount				Standard Errors			
	North East	South	Mid West	West	NE	S	MW	W
Non-Hispanic White & Other								
Owner								
Urbanized Areas 250,000 +	-2.13	0.68	-0.26	-0.34	1.08	0.71	0.39	0.65
Other Urban	-1.08	0.52	-0.10	0.62	0.49	0.42	0.40	0.56
Non-Urban	-0.54	0.18	-0.71	0.29	0.70	0.69	1.18	0.69
Non-owner								
Urbanized Areas 250,000 +	1.16	2.56	2.33	3.18	1.39	1.48	1.61	1.62
Other Urban	3.41	3.20	1.23	4.49	1.51	1.74	1.09	1.34
Non-Urban	6.52	6.23	2.85	6.08	4.20	1.71	1.51	1.81
Black								
Owner								
Urbanized Areas 250,000 +	1.63	2.16	0.81	6.10	1.91	0.90	0.87	1.91
Other Urban		1.34				0.98		
Non-Urban		3.52				1.90		
Non-owner								
Urbanized Areas 250,000 +	8.37	6.27	5.99	9.96	1.61	1.90	1.68	2.72
Other Urban		4.15				1.18		
Non-Urban		4.62				5.33		
Non-Black Hispanic								
Owner								
Urbanized Areas 250,000 +	0.67	2.53	-1.33	2.89	4.45	0.90	2.58	0.87
Other Urban		0.94				1.64		
Non-Urban		2.73				2.69		
Non-owner								
Urbanized Areas 250,000 +	6.72	9.34	6.64	5.91	3.51	2.59	3.26	1.84
Other Urban		6.60				2.74		
Non-Urban		15.80				5.01		
Asian & Pacific Islander								
Owner		-1.45				1.50		
Non-owner		6.96				2.52		
American Indians on Reservations		12.22				4.73		

Negative numbers in table signify an estimated overcount.

Attachment 11: Place Level Estimates and Estimated Undercount Rates (Places with 100,000 or More Population)

State/Place/Place Name		1990 Census	357 PES July 1992 Estimate	UC Rt	SE(UCRt)
01	0185 Birmingham city	265968	273918	2.902	0.750
01	0935 Huntsville city	159789	162535	1.689	0.587
01	1165 Mobile city	196278	201181	2.437	0.619
01	1180 Montgomery city	187106	190738	1.904	0.521
02	0140 Anchorage city	226338	232174	2.514	0.518
04	0140 Glendale city	148134	150735	1.725	0.571
04	0215 Mesa city	288091	292643	1.556	0.638
04	0260 Phoenix city	983403	1003800	2.032	0.515
04	0305 Scottsdale city	130069	131178	0.846	0.612
04	0360 Tempe city	141865	145453	2.467	0.791
04	0380 Tucson city	405390	415971	2.544	0.542
05	1195 Little Rock city	175795	179875	2.268	0.610
06	0070 Anaheim city	266406	273740	2.679	0.538
06	0180 Bakersfield city	174820	179398	2.552	0.511
06	0245 Berkeley city	102724	106630	3.664	0.712
06	0525 Chula Vista city	135[illegible]	138715	2.561	0.475
06	0595 Concord city	111348	113137	1.582	0.580
06	0880 El Monte city	106209	110792	4.137	...14
06	0935 Escondido city	108635	111040	2.166	0.549
06	1080 Fremont city	173339	176094	1.565	0.522
06	1090 Fresno city	354202	366527	3.363	0.555
06	1095 Fullerton city	114144	116725	2.211	0.514
06	1110 Garden Grove city	143050	146412	2.296	0.515
06	1130 Glendale city	180038	184515	2.426	0.579
06	1225 Hayward city	111498	114720	2.809	0.503
06	1300 Huntington Beach city	181519	184639	1.690	0.635
06	1340 Inglewood city	109602	116991	6.316	1.290
06	1347 Irvine city	110330	112191	1.659	0.665
06	1610 Long Beach city	429433	445925	3.698	0.594
06	1630 Los Angeles city	3485398	3624206	3.830	0.651
06	1790 Modesto city	164730	168849	2.440	0.500
06	1849 Moreno Valley city	118779	121925	2.580	0.457
06	1970 Oakland city	372242	391553	4.932	0.919
06	1990 Oceanside city	128398	131711	2.515	0.510
06	2005 Ontario city	133179	137458	3.113	0.551
06	2015 Orange city	110658	112738	1.845	0.495
06	2050 Oxnard city	142216	147164	3.362	0.643
06	2125 Pasadena city	131591	136431	3.548	0.582
06	2230 Pomona city	131723	137116	3.933	0.693
06	2278 Rancho Cucamonga city	101409	103309	1.839	0.485
06	2370 Riverside city	226505	232608	2.624	0.492
06	2420 Sacramento city	369365	380734	2.987	0.538
06	2435 Salinas city	108777	112703	3.484	0.993
06	2450 San Bernardino city	164164	170249	3.574	0.577
06	2475 San Diego city	1110549	1143032	2.842	0.527
06	2485 San Francisco city	723959	745573	2.899	0.626
06	2510 San Jose city	782248	801296	2.377	0.474
06	2570 Santa Ana city	293742	305815	3.948	0.871
06	2583 Santa Clarita city	110642	111997	1.210	0.558
06	2615 Santa Rosa city	113313	115898	2.231	0.533
06	2702 Simi Valley city	100217	102006	1.754	0.449
06	2805 Stockton city	210943	218358	3.396	0.600
06	2835 Sunnyvale city	117229	119999	2.308	0.610
06	2897 Thousand Oaks city	104352	105407	1.001	0.353
06	2910 Torrance city	133107	135125	1.494	0.564
06	3000 Vallejo city	109199	112178	2.656	0.544
08	0055 Aurora city	222103	227110	2.205	0.583
08	0240 Colorado Springs city	281140	287033	2.053	0.631
08	0320 Denver city	467610	480842	2.756	0.498
08	0760 Lakewood city	126481	128094	1.259	0.649
09	001010 Bridgeport town	141686	145631	2.709	1.029
09	001090 Stamford town	108056	109430	1.256	0.461
09	003070 Hartford town	139739	146308	4.490	1.231
09	009075 New Haven town	130474	135057	3.393	0.842
09	009120 Waterbury town	108961	110722	1.591	0.534
11	0005 Washington city	606900	628309	3.407	0.901
12	0645 Fort Lauderdale city	149377	152687	2.168	0.660
12	0860 Hialeah city	188004	197448	4.783	1.621
12	0915 Hollywood city	121697	123463	1.431	0.569
12	1003 Jacksonville city (remainder)	635230	649437	2.188	0.548
12	1370 Miami city	358548	377379	4.990	1.527
12	1600 Orlando city	164693	169260	2.698	0.700
12	1900 St. Petersburg city	238629	242149	1.454	0.553
12	2070 Tallahassee city	124773	127834	2.395	0.816
12	2075 Tampa city	280015	287445	2.585	0.627
13	0150 Atlanta city	394017	407923	3.409	0.912
13	0660 Columbus city (remainder)	178681	182489	2.087	0.554
13	1725 Macon city	106612	109027	2.215	0.586
13	2540 Savannah city	137560	140538	2.119	0.560
15	0110 Honolulu CDP	365272	372146	1.847	0.980
16	0090 Boise City city	125738	128336	2.024	0.542
17	1051 Chicago city	2783726	2852041	2.395	0.769
17	4590 Peoria city	113504	114753	1.089	0.416
17	4965 Rockford city	139426	140598	0.834	0.422
17	5480 Springfield city	105227	105921	0.655	0.456
18	0775 Evansville city	126272	126950	0.534	0.475
18	0825 Fort Wayne city	173072	174511	0.824	0.429
18	0905 Gary city	116646	119611	2.479	0.719
18	1145 Indianapolis	731327	741712	1.400	0.523
18	2375 South Bend city	105511	106417	0.851	0.377
19	0670 Cedar Rapids city	108751	109199	0.410	0.430
19	1130 Des Moines city	193187	194978	0.919	0.506
20	1430 Kansas City city	149767	151947	1.435	0.494
20	2194 Overland Park city	111790	112485	0.618	0.480
20	2795 Topeka city	119883	120748	0.716	0.434
20	3040 Wichita city	304011	307807	1.233	0.518
21	1160 Lexington-Fayette	225366	229930	1.985	0.705
21	1230 Louisville city	269063	274816	2.094	0.616
22	0895 Baton Rouge city	219531	226061	2.889	0.704
22	0956 New Orleans city	496938	513936	3.307	0.876
22	1240 Shreveport city	198525	203753	2.566	0.633
24	0825 Baltimore city	736014	759127	3.045	0.808
25	013090 Springfield city	156983	159597	1.638	0.850
25	017130 Lowell city	103439	105772	2.206	0.667
25	025005 Boston city	574283	590703	2.780	0.784
25	027300 Worcester city	169759	171148	0.812	0.816
26	0080 Ann Arbor city	109592	111442	1.660	0.522
26	0680 Detroit city	1027974	1056180	2.671	0.727
26	0920 Flint city	140761	143923	2.197	0.584
26	1085 Grand Rapids city	189126	191834	1.412	0.504
26	1485 Lansing city	127321	129424	1.625	0.553
26	1565 Livonia city	100850	100700	-0.149	0.364
26	2583 Sterling Heights city	117810	117955	0.123	0.402
26	2790 Warren city	144864	145018	0.106	0.394
27	2585 Minneapolis city	368383	374537	1.643	0.605
27	3425 St. Paul city	272235	275962	1.351	0.560
28	0615 Jackson city	196637	202591	2.939	0.719
29	2125 Independence city	112301	112970	0.592	0.493
29	2220 Kansas City city	435146	441627	1.468	0.516
29	3875 St. Louis city	396685	405175	2.096	0.682
29	4075 Springfield city	140494	141640	0.669	0.501
31	1425 Lincoln city	191972	193365	0.720	0.455
31	1825 Omaha city	335795	339436	1.073	0.498
32	0065 Las Vegas city	258295	266680	2.412	0.535
32	0090 Reno city	133850	137829	2.887	0.670
34	1715 Elizabeth city	110002	113626	3.189	1.244
34	2290 Jersey City city	228537	236914	3.536	0.942
34	2895 Newark city	275221	289965	5.085	1.113
34	3115 Paterson city	140891	146865	4.068	1.332
35	0015 Albuquerque city	384736	393462	2.218	0.480
36	0030 Albany city	101082	103108	1.965	0.802
36	0450 Buffalo city	328123	334286	1.844	0.726
36	2505 New York city	7322564	7567146	3.232	0.921
36	3100 Rochester city	231636	237133	2.318	0.746
36	3565 Syracuse city	163860	166653	1.674	0.769

UC RT — Undercount Rate as estimated from the PES.

SE(UCRt) — The sampling error of the estimated undercount rate.

36	4075	Yonkers city	188082	190656	1.350	0.852
37	0480	Charlotte city	395934	405932	2.463	0.635
37	0750	Durham city	136611	139962	2.394	0.712
37	1065	Greensboro city	183521	187128	1.928	0.866
37	2020	Raleigh city	207951	213485	2.592	0.728
37	2785	Winston-Salem city	143485	146388	1.983	0.619
39	0035	Akron city	223019	226256	1.431	0.520
39	0865	Cincinnati city	364040	372392	2.243	0.719
39	0900	Cleveland city	505616	516598	2.126	0.650
39	0960	Columbus city	632910	645256	1.913	0.630
39	1110	Dayton city	182044	185861	2.054	0.624
39	4265	Toledo city	332943	337317	1.297	0.497
40	1815	Oklahoma City city	444719	454630	2.180	0.548
40	2465	Tulsa city	367302	374856	2.015	0.597
41	0360	Eugene city	112669	115726	2.641	0.685
41	0905	Portland city	437319	445566	1.851	0.659
41	1005	Salem city	107786	110240	2.227	0.566
42	0165	Allentown city	105090	105216	0.120	0.831
42	3685	Erie city	108718	109866	1.045	0.534
42	7180	Philadelphia city	1585577	1608942	1.452	0.742
42	7234	Pittsburgh city	369879	373752	1.036	0.728
44	007065	Providence city	160728	164304	2.176	0.829
46	1225	Sioux Falls city	100814	101208	0.389	0.496
47	0245	Chattanooga city	152466	155875	2.187	0.637
47	0760	Knoxville city	165121	168582	2.053	0.698
47	0960	Memphis city	610337	628329	2.864	0.700
47	1016	Nashville-Davidson (remainder)	488374	499383	2.205	0.625
48	0015	Abilene city	106654	108885	2.049	0.646
48	0100	Amarillo city	157615	160530	1.816	0.577
48	0175	Arlington city	261721	269098	2.742	0.608
48	0210	Austin city	465622	483156	3.629	0.752
48	0320	Beaumont city	114323	116654	1.998	0.500
48	0980	Corpus Christi city	257453	267127	3.622	0.798
48	1085	Dallas city	1006877	1043947	3.551	0.727
48	1340	El Paso city	515342	538250	4.256	0.964
48	1500	Fort Worth city	447619	461686	3.047	0.606
48	1580	Garland city	180650	185336	2.528	0.539
48	1975	Houston city	1630553	1697301	3.933	0.777
48	2060	Irving city	155037	160622	3.477	0.762
48	2400	Laredo city	122899	126611	2.932	1.262
48	2565	Lubbock city	186206	190661	2.334	0.688
48	2795	Mesquite city	101484	103803	2.234	0.541
48	3200	Pasadena city	119363	123539	3.380	0.721
48	3310	Plano city	128713	131188	1.887	0.560
48	3745	San Antonio city	935933	974099	3.918	0.857
48	4415	Waco city	103590	106382	2.624	0.728
49	0870	Salt Lake City city	159936	163014	1.888	0.721
51	0025	Alexandria city	111183	114451	2.856	0.771
51	0242	Chesapeake city	151976	155185	2.068	0.509
51	0590	Hampton city	133793	137415	2.636	0.617
51	0860	Newport News city	170045	175121	2.899	0.689
51	0875	Norfolk city	261229	269011	2.893	0.733
51	0990	Portsmouth city	103907	106837	2.742	0.695
51	1035	Richmond city	203056	208987	2.838	0.817
51	1280	Virginia Beach city	393069	402092	2.244	0.558
53	1140	Seattle city	516259	528151	2.252	0.670
53	1220	Spokane city	177196	179391	1.223	0.739
53	1280	Tacoma city	176664	180831	2.306	0.622
55	1675	Madison city	191262	193499	1.156	0.504
55	1845	Milwaukee city	628088	642860	2.298	0.681

Attachment 12: County Level Estimates and Estimated Undercount Rates (Counties with 100,000 or More Population)

State/County/County Name	1990 Census	357 PES July 1992 Estimate	UC Rt	SE(UCRt)
01 015 Calhoun County	116034	117856	1.544	0.424
01 073 Jefferson County	651525	665329	2.075	0.517
01 089 Madison County	238912	242937	1.657	0.478
01 097 Mobile County	378643	387137	2.194	0.479
01 101 Montgomery County	209085	213105	1.886	0.480
01 103 Morgan County	100043	101438	1.375	0.407
01 125 Tuscaloosa County	150522	153449	1.908	0.508
02 020 Anchorage Borough	226338	232174	2.514	0.518
04 013 Maricopa County	2122101	2160697	1.786	0.312
04 019 Pima County	666880	681920	2.206	0.464
04 021 Pinal County	116379	120833	3.045	0.584
04 025 Yavapai County	107714	109685	1.797	0.442
04 027 Yuma County	106895	109960	2.787	0.572
05 119 Pulaski County	349660	357441	2.177	0.517
05 143 Washington County	113409	115578	1.877	0.615
06 001 Alameda County	1279182	1317233	2.889	0.[illegible]
06 007 Butte County	182120	186831	2.522	0.554
06 013 Contra Costa County	803732	817943	1.737	0.400
06 017 El Dorado County	125995	128413	1.883	0.451
06 019 Fresno County	667490	691987	3.540	0.501
06 023 Humboldt County	119118	122410	2.689	0.488
06 025 Imperial County	109303	113220	3.460	0.866
06 029 Kern County	543477	558753	2.734	0.375
06 031 Kings County	101469	105099	3.454	0.581
06 037 Los Angeles County	8863164	9168889	3.334	0.568
06 041 Marin County	230096	232947	1.224	0.523
06 047 Merced County	178403	185486	3.777	0.628
06 053 Monterey County	355660	367580	3.243	0.644
06 055 Napa County	110765	113298	2.236	0.447
06 059 Orange County	2410556	2461373	2.065	0.493
06 061 Placer County	172796	175303	1.430	0.374
06 065 Riverside County	1170413	1198964	2.381	0.343
06 067 Sacramento County	1041219	1063198	2.251	0.524
06 071 San Bernardino County	1418380	1455550	2.554	0.355
06 073 San Diego County	2498016	2560392	2.436	0.486
06 075 San Francisco County	723959	743573	2.899	0.626
06 077 San Joaquin County	480628	495154	2.934	0.381
06 079 San Luis Obispo County	217162	222841	2.549	0.500
06 081 San Mateo County	649[illegible]	661709	1.826	0.457
06 083 Santa Barbara County	36[illegible]	381039	3.000	0.643
06 085 Santa Clara County	1497577	1531196	2.196	0.475
06 087 Santa Cruz County	229734	236007	2.658	0.531
06 089 Shasta County	147036	150145	2.070	0.447
06 095 Solano County	340421	348512	2.322	0.324
06 097 Sonoma County	388222	397377	2.304	0.422
06 099 Stanislaus County	370522	380699	2.673	0.475
06 107 Tulare County	311921	323520	3.585	0.681
06 111 Ventura County	669016	683672	2.144	0.357
06 113 Yolo County	141092	145975	3.343	0.565
08 001 Adams County	265038	269856	1.786	0.496
08 005 Arapahoe County	391511	397542	1.517	0.588
08 013 Boulder County	225339	230754	2.347	0.533
08 031 Denver County	467610	480862	2.756	0.498
08 041 El Paso County	397014	405212	2.023	0.558
08 059 Jefferson County	438430	442890	1.007	0.577
08 069 Larimer County	186136	190569	2.326	0.527
08 101 Pueblo County	123051	125754	2.149	0.548
08 123 Weld County	131821	135793	2.925	0.518
09 001 Fairfield County	827643	832682	0.605	0.384
09 003 Hartford County	851783	857897	0.713	0.483
09 005 Litchfield County	174092	175080	0.565	0.323
09 007 Middlesex County	143196	143825	0.437	0.326
09 009 New Haven County	804219	807987	0.466	0.514
09 011 New London County	254957	257535	1.001	0.470

UCRt Undercount Rate as estimated from the PES.

(UCRt) The sampling error of the estimated undercount rate.

09	013	Tolland County	128699	129510	0.426	0.561
09	015	Windham County	102525	103793	1.222	0.681
10	001	Kent County	110993	112995	1.772	0.394
10	003	New Castle County	441946	450294	1.854	0.516
10	005	Sussex County	113229	115083	1.611	0.452
11	001	District of Columbia	606900	628309	3.487	0.901
12	001	Alachua County	181596	186051	2.394	0.635
12	005	Bay County	126994	129096	1.629	0.536
12	009	Brevard County	398978	404953	1.476	0.665
12	011	Broward County	1255488	1277394	1.715	0.529
12	015	Charlotte County	110975	111898	0.825	0.353
12	019	Clay County	105986	107762	1.648	0.376
12	021	Collier County	152099	154958	1.845	0.646
12	025	Dade County	1937094	2011300	3.690	0.965
12	031	Duval County	672971	687821	2.159	0.549
12	033	Escambia County	262798	268329	2.061	0.695
12	053	Hernando County	101115	102051	0.918	0.319
12	057	Hillsborough County	834054	853411	2.268	0.678
12	069	Lake County	152104	154003	1.233	0.341
12	071	Lee County	335113	339589	1.318	0.466
12	073	Leon County	192493	196621	2.100	0.615
12	081	Manatee County	211707	214609	1.352	0.513
12	083	Marion County	194833	197743	1.472	0.354
12	085	Martin County	100900	102129	1.195	0.406
12	091	Okaloosa County	143776	146346	1.756	0.593
12	095	Orange County	677491	693622	2.326	0.530
12	097	Osceola County	107728	109720	1.816	0.479
12	099	Palm Beach County	863518	876764	1.511	0.493
12	101	Pasco County	281131	283694	0.904	0.395
12	103	Pinellas County	851659	860438	1.020	0.555
12	105	Polk County	405382	411918	1.587	0.405
12	111	St. Lucie County	150171	152554	1.562	0.474
12	115	Sarasota County	277776	279921	0.766	0.505
12	117	Seminole County	287529	292734	1.779	0.505
12	127	Volusia County	370712	373737	1.338	0.462
13	021	Bibb County	149967	1[illegible]35	2.005	0.475
13	051	Chatham County	216935	221102	1.885	0.580
13	063	Clayton County	182052	186841	2.563	0.587
13	067	Cobb County	447745	456480	1.914	0.543
13	089	DeKalb County	545837	561155	2.730	0.601
13	121	Fulton County	648951	668695	2.953	0.730
13	135	Gwinnett County	352910	359473	1.826	0.481
13	215	Muscogee County	179278	183097	2.086	0.554
13	245	Richmond County	189719	194873	2.645	0.586
15	001	Hawaii County	120317	122654	1.905	0.75
15	003	Honolulu County	836231	852074	1.859	0.83
15	009	Maui County	100374	102187	1.774	0.74
16	001	Ada County	205775	209575	1.813	0.66
17	019	Champaign County	173025	175375	1.349	0.61
17	031	Cook County	5105067	5186429	1.569	0.57
17	043	DuPage County	781666	784956	0.419	0.39
17	089	Kane County	317471	320253	0.869	0.41
17	097	Lake County	516418	519660	0.624	0.33
17	099	La Salle County	106913	107150	0.222	0.41
17	111	McHenry County	183241	183780	0.293	0.38
17	113	McLean County	129180	130128	0.729	0.46
17	115	Macon County	117206	117856	0.551	0.35
17	119	Madison County	249238	250644	0.483	0.36
17	143	Peoria County	182827	184180	0.735	0.37
17	161	Rock Island County	148723	149787	0.711	0.45
17	163	St. Clair County	262852	266421	1.340	0.44
17	167	Sangamon County	178386	179149	0.426	0.37
17	179	Tazewell County	123692	123962	0.202	0.44
17	197	Will County	357313	359200	0.525	0.27
17	201	Winnebago County	252913	254302	0.546	0.3
18	003	Allen County	300836	302274	0.476	0.3
18	035	Delaware County	119639	120341	0.586	0.4
18	039	Elkhart County	156198	156797	0.382	0.4
18	057	Hamilton County	108936	109211	0.252	0.3
18	089	Lake County	475594	480322	0.994	0.4
18	091	La Porte County	107066	107368	0.281	0.4
18	095	Madison County	130669	131090	0.321	0.4

18	097	Marion County	797159	808143	1.359	0.523
18	105	Monroe County	108978	110094	1.013	0.498
18	127	Porter County	128932	129287	0.274	0.397
18	141	St. Joseph County	247052	248403	0.544	0.355
18	157	Tippecanoe County	130598	132098	1.135	0.459
18	163	Vanderburgh County	165058	165711	0.394	0.418
18	167	Vigo County	106107	106607	0.469	0.398
19	013	Black Hawk County	123798	124329	0.587	0.375
19	113	Linn County	168767	169329	0.332	0.387
19	153	Polk County	327140	329530	0.725	0.432
19	163	Scott County	150979	152246	0.832	0.431
20	091	Johnson County	355054	357029	0.553	0.418
20	173	Sedgwick County	403662	407780	1.010	0.440
20	177	Shawnee County	160976	161845	0.537	0.396
20	209	Wyandotte County	161993	164206	1.348	0.460
21	067	Fayette County	225366	229930	1.985	0.705
21	111	Jefferson County	664937	676776	1.749	0.537
21	117	Kenton County	142031	144235	1.528	0.552
22	017	Caddo Parish	248253	254356	2.400	0.529
22	019	Calcasieu Parish	168134	170974	1.661	0.420
22	033	East Baton Rouge Parish	380105	390145	2.574	0.569
22	051	Jefferson Parish	448306	457937	2.103	0.525
22	055	Lafayette Parish	164762	168125	2.000	0.497
22	071	Orleans Parish	496938	513936	3.307	0.876
22	073	Ouachita Parish	142191	144953	1.905	0.638
22	079	Rapides Parish	131556	133995	1.820	0.399
22	103	St. Tammany Parish	144508	144874	1.611	0.365
23	001	Androscoggin County	105259	106120	0.812	0.511
23	005	Cumberland County	243135	245246	0.861	0.524
23	011	Kennebec County	115904	116582	0.581	0.505
23	019	Penobscot County	146601	147738	0.770	0.532
23	031	York County	164587	165635	0.633	0.520
24	003	Anne Arundel County	427239	434447	1.659	0.406
24	005	Baltimore County	692134	702812	1.519	0.507
24	013	Carroll County	123372	124911	1.232	0.459
24	017	Charles County	101154	102794	1.595	0.403
24	021	Frederick County	150208	152690	1.626	0.431
24	025	Harford County	182132	185018	1.560	0.359
24	027	Howard County	187328	190409	1.618	0.466
24	031	Montgomery County	757027	771160	1.833	0.482
24	033	Prince George's County	729268	751587	2.970	0.627
24	043	Washington County	121393	123237	1.496	0.460
24	510	Baltimore city	736014	759127	3.045	0.808
25	001	Barnstable County	186605	187904	0.691	0.530
25	003	Berkshire County	139352	140508	0.823	0.505
25	005	Bristol County	506325	509637	0.650	0.452
25	009	Essex County	670080	671451	0.204	0.466
25	013	Hampden County	456310	458054	0.381	0.706
25	015	Hampshire County	146568	147848	0.866	0.355
25	017	Middlesex County	1398468	1399207	0.053	0.615
25	021	Norfolk County	616087	611139	-0.810	0.744
25	023	Plymouth County	435276	436400	0.258	0.406
25	025	Suffolk County	663906	680818	2.484	0.777
25	027	Worcester County	709705	713339	0.509	0.456
26	017	Bay County	111723	111895	0.153	0.450
26	021	Berrien County	161378	162674	0.796	0.454
26	025	Calhoun County	135982	136672	0.505	0.398
26	049	Genesee County	430459	434600	0.953	0.614
26	065	Ingham County	281912	286089	1.460	0.534
26	075	Jackson County	149756	150189	0.288	0.51
26	077	Kalamazoo County	223411	224957	0.687	0.40
26	081	Kent County	500631	504353	0.738	0.40
26	093	Livingston County	115645	115499	-0.126	0.96
26	099	Macomb County	717400	718766	0.190	0.38
26	115	Monroe County	133600	133783	0.137	0.57
26	121	Muskegon County	158983	159784	0.501	0.39
26	125	Oakland County	1083592	1088374	0.439	0.38
26	139	Ottawa County	187768	188460	0.367	0.44
26	145	Saginaw County	211946	213567	0.759	0.40
26	147	St. Clair County	145607	145854	0.169	0.51
26	161	Washtenaw County	282937	286038	1.084	0.42
26	163	Wayne County	2111687	2144482	1.929	0.47

27	003	Anoka County	243641	244251	.0.250	0.375
27	037	Dakota County	275227	276471	0.450	0.389
27	053	Hennepin County	1032431	1041265	0.848	0.467
27	109	Olmsted County	106470	106753	0.265	0.411
27	123	Ramsey County	485765	490387	0.943	0.479
27	137	St. Louis County	198213	198442	0.126	0.430
27	145	Stearns County	118791	119274	0.405	0.560
27	163	Washington County	145896	146053	0.108	0.344
28	047	Harrison County	165365	168426	1.818	0.509
28	049	Hinds County	254441	261731	2.785	0.609
28	059	Jackson County	115263	117089	1.576	0.407
29	019	Boone County	112379	113620	1.092	0.444
29	047	Clay County	153411	154298	0.575	0.414
29	077	Greene County	207949	208941	0.475	0.429
29	095	Jackson County	633232	640624	1.154	0.466
29	099	Jefferson County	171380	171632	0.147	0.504
29	183	St. Charles County	212907	213851	0.442	0.380
29	189	St. Louis County	993529	999753	0.623	0.370
29	510	St. Louis city	396685	405175	2.096	0.682
30	111	Yellowstone County	113419	115539	1.835	0.450
31	055	Douglas County	416444	420353	0.930	0.453
31	109	Lancaster County	213641	215022	0.642	0.420
31	153	Sarpy County	102583	103780	1.154	0.483
32	003	Clark County	741459	758692	2.271	0.521
32	031	Washoe County	254667	261007	2.429	0.510
33	011	Hillsborough County	336073	338911	0.838	0.500
33	013	Merrimack County	120005	120910	0.748	0.639
33	015	Rockingham County	245845	247556	0.691	0.546
33	017	Strafford County	104233	105081	0.807	0.557
34	001	Atlantic County	224327	226943	1.153	0.374
34	003	Bergen County	825380	820928	-0.542	0.786
34	005	Burlington County	395066	394939	-0.032	0.568
34	007	Camden County	502824	503429	0.120	0.719
34	011	Cumberland County	138053	139656	1.148	0.379
34	013	Essex County	778206	799678	2.685	0.782
34	015	Gloucester County	230082	229108	-0.426	0.624
34	017	Hudson County	553099	569258	2.839	1.107
34	019	Hunterdon County	107776	108451	0.623	0.745
34	021	Mercer County	325824	328647	0.859	0.554
34	023	Middlesex County	671780	672992	0.180	0.712
34	025	Monmouth County	553124	550805	-0.421	0.687
34	027	Morris County	421353	419138	-0.529	0.670
34	029	Ocean County	433203	429899	-0.769	0.702
34	031	Passaic County	453060	459194	1.336	0.858
34	035	Somerset County	240279	239512	-0.320	0.617
34	037	Sussex County	130943	131218	0.210	0.539
34	039	Union County	493819	497433	0.727	0.778
35	001	Bernalillo County	480577	491854	2.293	0.457
35	013	Dona Ana County	135510	139939	3.165	0.665
36	001	Albany County	292594	293849	0.427	0.656
36	005	Bronx County	1203789	1265768	4.897	1.410
36	007	Broome County	212160	213689	0.716	0.458
36	013	Chautauqua County	141895	143047	0.805	0.539
36	027	Dutchess County	259462	261808	0.896	0.459
36	029	Erie County	968532	969213	0.070	0.650
36	045	Jefferson County	110943	112635	1.503	0.718
36	047	Kings County	2300664	2389150	3.704	0.906
36	055	Monroe County	713968	716126	0.301	0.641
36	059	Nassau County	1287348	1277449	-0.775	0.827
36	061	New York County	1487536	1541441	3.497	0.989
36	063	Niagara County	220756	220729	-0.012	0.512
36	065	Oneida County	250836	252906	0.819	0.647
36	067	Onondaga County	468973	469750	0.165	0.638
36	071	Orange County	307647	310882	1.040	0.651
36	075	Oswego County	121771	122882	0.904	0.685
36	081	Queens County	1951598	1992906	2.029	0.806
36	083	Rensselaer County	154429	155072	0.415	0.591
36	085	Richmond County	378977	378782	-0.052	0.722
36	087	Rockland County	265475	264771	-0.266	0.734
36	089	St. Lawrence County	111974	113179	1.064	0.664
36	091	Saratoga County	181276	181850	0.316	0.500
36	093	Schenectady County	149285	148589	-0.468	0.720

36	103	Suffolk County	1321864	1313344	+0.649	0.72
36	111	Ulster County	165304	167385	1.244	0.73
36	119	Westchester County	874866	879705	0.550	0.68
37	001	Alamance County	108213	109811	1.455	0.40
37	021	Buncombe County	174821	177162	1.321	0.41
37	035	Catawba County	118412	120094	1.401	0.42
37	051	Cumberland County	274566	280604	2.152	0.51
37	057	Davidson County	126677	128544	1.453	0.45
37	063	Durham County	181835	185785	2.126	0.57
37	067	Forsyth County	265878	270363	1.659	0.46
37	071	Gaston County	175093	177837	1.543	0.45
37	081	Guilford County	347420	353615	1.752	0.50
37	119	Mecklenburg County	511433	523306	2.269	0.55
37	129	New Hanover County	120284	122381	1.714	0.54
37	133	Onslow County	149838	153141	2.157	0.41
37	147	Pitt County	107924	110516	2.345	0.55
37	151	Randolph County	106546	108009	1.354	0.43
37	155	Robeson County	105179	107475	2.136	0.53
37	159	Rowan County	110605	112305	1.514	0.37
37	183	Wake County	423380	432630	2.138	0.49
37	191	Wayne County	104666	106769	1.969	0.39
38	017	Cass County	102874	103452	0.559	0.46
39	003	Allen County	109755	110262	0.460	0.41
39	017	Butler County	291679	292902	0.486	0.35
39	023	Clark County	147548	148179	0.426	0.40
39	025	Clermont County	150187	150784	0.396	0.52
39	029	Columbiana County	108276	108375	0.091	0.58
39	035	Cuyahoga County	1412140	1427932	1.106	0.47
39	045	Fairfield County	103461	103594	0.129	0.52
39	049	Franklin County	961437	975539	1.446	0.53
39	057	Greene County	136731	137700	0.704	0.32
39	061	Hamilton County	866228	876795	1.205	0.48
39	085	Lake County	215498	216122	0.288	0.37
39	089	Licking County	128300	128558	0.201	0.51
39	093	Lorain County	271126	272668	0.565	0.36
39	095	Lucas County	462361	46..96	1.014	0.43
39	099	Mahoning County	264806	266443	0.614	0.37
39	103	Medina County	122354	122484	0.106	0.46
39	113	Montgomery County	573809	580267	1.113	0.46
39	133	Portage County	142585	143615	0.717	0.54
39	139	Richland County	126137	126535	0.314	0.41
39	151	Stark County	367585	368829	0.337	0.38
39	153	Summit County	514990	518979	0.769	0.41
39	155	Trumbull County	227813	228736	0.403	0.39
39	165	Warren County	113909	114158	0.218	0.36
39	169	Wayne County	101461	101745	0.279	0.42
39	173	Wood County	113269	113912	0.565	0.41
40	027	Cleveland County	174253	177845	2.020	0.53
40	031	Comanche County	111486	113756	1.996	0.50
40	109	Oklahoma County	599611	612788	2.150	0.54
40	143	Tulsa County	503341	512953	1.874	0.53
41	005	Clackamas County	278850	281892	1.079	0.45
41	029	Jackson County	146389	149287	1.941	0.44
41	039	Lane County	282912	289266	2.197	0.49
41	047	Marion County	228483	233587	2.185	0.43
41	051	Multnomah County	583887	593788	1.668	0.65
41	067	Washington County	311554	315806	1.344	0.62
42	003	Allegheny County	1336449	1331707	-0.356	0.75
42	007	Beaver County	186093	185256	-0.452	0.63
42	011	Berks County	336523	338569	0.604	0.42
42	013	Blair County	130542	131077	0.408	0.44
42	017	Bucks County	541174	537873	-0.614	-0.63
42	019	Butler County	152013	152898	0.579	0.62
42	021	Cambria County	163029	163876	0.517	0.48
42	027	Centre County	123786	125635	1.472	0.72
42	029	Chester County	376396	377088	0.184	0.52
42	041	Cumberland County	195257	195256	-0.001	0.54
42	043	Dauphin County	237813	239154	0.561	0.57
42	045	Delaware County	547651	545064	-0.475	0.77
42	049	Erie County	275572	277235	0.600	0.42
42	051	Fayette County	145351	146681	0.907	0.81
42	055	Franklin County	121082	122180	0.899	0.73

42	069	Lackawanna County	219039	217294	-0.803
42	071	Lancaster County	422822	426528	0.869
42	075	Lebanon County	113744	114518	0.676
42	077	Lehigh County	291130	289980	-0.396
42	079	Luzerne County	328149	326439	-0.524
42	081	Lycoming County	118710	119511	0.670
42	085	Mercer County	121003	121627	0.513
42	091	Montgomery County	678111	673620	-0.667
42	095	Northampton County	247105	244917	-0.896
42	101	Philadelphia County	1585577	1608942	1.452
42	107	Schuylkill County	152585	152989	0.264
42	125	Washington County	204584	204548	-0.018
42	129	Westmoreland County	370321	369009	-0.354
42	133	York County	339574	341321	0.512
44	003	Kent County	161135	159355	-1.117
44	007	Providence County	596270	597960	0.283
44	009	Washington County	110006	110982	0.880
45	003	Aiken County	120940	123291	1.907
45	007	Anderson County	145196	147268	1.407
45	015	Berkeley County	128776	132081	2.502
45	019	Charleston County	295039	302751	2.547
45	041	Florence County	114344	116743	2.056
45	045	Greenville County	320167	325537	1.650
45	051	Horry County	144053	146650	1.771
45	063	Lexington County	167611	170341	1.602
45	079	Richland County	285720	293299	2.584
45	083	Spartanburg County	226800	230614	1.654
45	085	Sumter County	102637	105017	2.267
45	091	York County	131497	133717	1.660
46	099	Minnehaha County	123809	124220	0.331
47	037	Davidson County	510784	522044	2.157
47	065	Hamilton County	285536	290664	1.764
47	093	Knox County	335749	341481	1.679
47	125	Montgomery County	190498	182468	1.923
47	149	Rutherford County	118570	120716	1.778
47	157	Shelby County	826330	847848	2.538
47	163	Sullivan County	143596	145270	1.152
47	165	Sumner County	103281	104756	1.408
48	027	Bell County	191088	195808	2.410
48	029	Bexar County	1185394	1230141	3.638
48	039	Brazoria County	191707	195577	1.979
48	041	Brazos County	121862	125880	3.192
48	061	Cameron County	260120	268639	3.178
48	085	Collin County	264036	269149	1.900
48	113	Dallas County	1852810	1912100	3.101
48	121	Denton County	273525	279483	2.132
48	135	Ector County	118934	121298	1.949
48	141	El Paso County	591610	617397	4.177
48	157	Fort Bend County	225421	230752	2.310
48	167	Galveston County	217399	221787	1.979
48	183	Gregg County	104948	106936	1.860
48	201	Harris County	2818199	2915587	3.340
48	215	Hidalgo County	383545	399991	4.112
48	245	Jefferson County	239397	243776	1.796
48	303	Lubbock County	222636	228182	2.430
48	309	McLennan County	189123	193347	2.185
48	329	Midland County	106611	108665	1.872
48	339	Montgomery County	182201	185687	1.877
48	355	Nueces County	291145	301959	3.581
48	423	Smith County	151309	154321	1.952
48	439	Tarrant County	1170103	1200703	2.549
48	441	Taylor County	119655	122112	2.012
48	453	Travis County	576407	596444	3.360
48	479	Webb County	133239	137203	2.889
48	485	Wichita County	122378	126508	1.711
48	491	Williamson County	139551	142663	2.182
49	011	Davis County	187941	190068	1.119
49	035	Salt Lake County	725956	735135	1.249
49	049	Utah County	263590	271102	2.771
49	057	Weber County	158330	160318	1.240
50	007	Chittenden County	131761	132975	0.913
51	013	Arlington County	170936	175366	2.537

51	041	Chesterfield County	209274	212658	1.591
51	059	Fairfax County	818584	833668	1.809
51	087	Henrico County	217881	221878	1.801
51	153	Prince William County	215686	220359	2.121
51	510	Alexandria city	111183	114451	2.856
51	550	Chesapeake city	151976	155185	2.068
51	650	Hampton city	133793	137615	2.656
51	700	Newport News city	170045	173121	2.899
51	710	Norfolk city	261229	269011	2.893
51	740	Portsmouth city	103907	106837	2.742
51	760	Richmond city	203056	208987	2.838
51	810	Virginia Beach city	393069	402092	2.244
53	005	Benton County	112560	115073	2.184
53	011	Clark County	238053	241186	1.299
53	033	King County	1507319	1531673	1.590
53	035	Kitsap County	189731	193702	2.058
53	053	Pierce County	586203	597344	1.865
53	061	Snohomish County	465642	471683	1.281
53	063	Spokane County	361364	365976	1.260
53	067	Thurston County	161238	164404	1.962
53	073	Whatcom County	127780	130903	2.386
53	077	Yakima County	188823	195170	3.252
54	039	Kanawha County	207619	210468	1.354
55	009	Brown County	194594	195417	0.421
55	025	Dane County	367085	370063	0.805
55	059	Kenosha County	128181	128869	0.534
55	073	Marathon County	115400	115646	0.213
55	079	Milwaukee County	959275	975296	1.643
55	087	Outagamie County	140510	141059	0.390
55	101	Racine County	175034	176209	0.667
55	105	Rock County	139510	140129	0.441
55	117	Sheboygan County	103877	104218	0.327
55	133	Waukesha County	304715	305387	0.220
55	139	Winnebago County	140320	140855	0.380

09	009075	New Haven town	130474	132416	1.467	0.844	135057	3.393	0.842
09	009120	Waterbury town	108961	109092	0.120	0.759	110722	1.591	0.534
11	0005	Washington city	606900	638747	4.986	0.517	628309	3.407	0.901
12	0645	Fort Lauderdale city	149377	153932	2.959	0.490	152687	2.168	0.660
12	0860	Hialeah city	188094	196416	4.283	0.935	197448	4.783	1.621
12	0915	Hollywood city	121697	125104	2.723	0.509	123443	1.431	0.369
12	1003	Jacksonville city (remainder)	635230	658739	3.569	0.662	649437	2.188	0.548
12	1370	Miami city	358548	376424	4.749	0.703	377379	4.990	1.527
12	1600	Orlando city	164693	170303	3.294	0.662	169260	2.698	0.700
12	1908	St. Petersburg city	238629	245561	2.823	0.472	242149	1.454	0.555
12	2070	Tallahassee city	124773	129647	3.759	0.526	127834	2.395	0.816
12	2075	Tampa city	280015	291356	3.893	0.649	287445	2.585	0.627
13	0150	Atlanta city	394017	415204	5.103	0.540	407923	3.609	0.912
13	0660	Columbus city (remainder)	178481	184860	3.343	0.505	182489	2.087	0.554
13	1725	Macon city	106612	110227	3.280	0.542	109027	2.215	0.586
13	2540	Savannah city	137560	142220	3.277	0.531	140538	2.119	0.560
15	0110	Honolulu CDP	365272	382505	4.505	0.803	372146	1.847	0.989
16	0090	Boise City city	125738	127612	1.469	0.702	128336	2.024	0.542
17	1051	Chicago city	2783726	2857364	2.577	0.582	2852041	2.395	0.769
17	4590	Peoria city	113504	116740	2.772	0.681	114753	1.089	0.416
17	4965	Rockford city	139426	143232	2.657	0.681	140598	0.834	0.422
17	5480	Springfield city	105227	107883	2.462	0.700	105921	0.655	0.456
18	0775	Evansville city	126272	129192	2.260	0.712	126950	0.534	0.475
18	0825	Fort Wayne city	173072	177949	2.761	0.690	174511	0.824	0.629
18	0905	Gary city	116646	122166	4.518	0.866	119611	2.479	0.719
18	1145	Indianapolis	731327	757483	0.835	0.612	741712	1.400	0.523
18	2375	South Bend city	105511	108564	2.812	0.681	106417	0.851	0.377
19	0670	Cedar Rapids city	108751	110887	1.926	0.648	109199	0.410	0.430
19	1130	Des Moines city	193187	197761	2.313	0.631	194978	0.919	0.506
20	1430	Kansas City city	149767	153306	2.309	0.483	151947	1.435	0.494
20	2194	Overland Park city	111790	112871	0.958	0.491	112485	0.618	0.480
20	2795	Topeka city	119883	123028	2.556	0.602	120748	0.716	0.434
20	3040	Wichita city	304011	308747	1.534	0.480	307807	1.233	0.518
21	1160	Lexington-Fayette	225366	233157	3.342	0.602	229930	1.985	0.705
21	1230	Louisville city	269063	279912	3.876	0.499	274816	2.094	0.616
22	0095	Baton Rouge city	219531	227504	3.505	0.479	226061	2.889	0.704
22	0956	New Orleans city	496938	514558	3.424	0.486	513936	3.307	0.876
22	1240	Shreveport city	198525	205361	3.329	0.482	203753	2.566	0.633
24	0025	Baltimore city	736014	772082	4.672	0.511	759127	3.065	0.808
25	013090	Springfield city	156983	158023	0.658	0.785	159597	1.638	0.850
25	017130	Lowell city	103439	103118	-0.311	0.770	105772	2.206	0.667
25	025005	Boston city	574283	579743	0.942	0.806	590703	2.780	0.784
25	027300	Worcester city	169759	169075	-0.405	0.753	171148	0.812	0.816
26	0080	Ann Arbor city	109592	112804	2.847	0.727	111442	1.660	0.522
26	0680	Detroit city	1027974	1064760	3.455	0.622	1056180	2.671	0.727
26	0920	Flint city	140761	144209	3.726	0.703	143923	2.197	0.584
26	1085	Grand Rapids city	189126	194874	2.950	0.666	191834	1.412	0.504
26	1485	Lansing city	127321	131473	3.158	0.684	129424	1.625	0.553
26	1565	Livonia city	100850	101462	0.603	0.527	100700	-0.149	0.364
26	2583	Sterling Heights city	117810	118625	0.687	0.514	117955	0.123	0.402
26	2790	Warren city	144864	145814	0.652	0.535	145018	0.106	0.394
27	2585	Minneapolis city	368383	374965	1.755	0.469	374537	1.643	0.605
27	3425	St. Paul city	272235	275845	1.309	0.485	275962	1.351	0.560
28	0615	Jackson city	196637	205662	4.388	0.515	202591	2.939	0.719
29	2125	Independence city	112301	113335	0.912	0.487	112970	0.592	0.493
29	2220	Kansas City city	435146	444859	2.183	0.472	441627	1.468	0.516
29	3875	St. Louis city	396685	408263	2.836	0.518	405175	2.096	0.682
29	4075	Springfield city	140494	143438	2.053	0.650	141640	0.669	0.501
31	1425	Lincoln city	191972	196234	2.172	0.660	193365	0.720	0.455
31	1825	Omaha city	335795	340507	1.384	0.476	339436	1.873	0.498
32	0065	Las Vegas city	258295	266308	3.009	0.562	264680	2.412	0.535
32	0090	Reno city	133850	136305	1.801	0.650	137829	2.887	0.670
34	1715	Elizabeth city	110002	111988	1.773	0.740	113626	3.189	1.244
34	2290	Jersey City city	228537	236712	3.454	0.681	236914	3.536	0.942
34	2895	Newark city	275221	285923	3.743	0.775	289965	5.085	1.113
34	3115	Paterson city	140891	146967	4.134	0.752	146885	4.068	1.332
35	0015	Albuquerque city	384736	397206	3.139	0.583	393462	2.218	0.680
36	0030	Albany city	101082	103456	2.295	0.692	103108	1.965	0.802
36	0450	Buffalo city	328123	333145	1.508	0.592	334286	1.844	0.726
36	2505	New York city	7322564	7552196	3.041	0.588	7567146	3.232	0.921
36	3100	Rochester city	231636	239832	3.417	0.720	237133	2.318	0.746
36	3565	Syracuse city	163860	167479	2.161	0.683	166653	1.676	0.769

36	4075	Yonkers city	188082	192435	2.262	0.664	190656	1.350	0.852
37	0480	Charlotte city	395934	412466	4.008	0.467	405932	2.463	0.635
37	0750	Durham city	136611	141713	3.600	0.536	139962	2.394	0.712
37	1065	Greensboro city	183521	189851	3.334	0.518	187128	1.928	0.646
37	2020	Raleigh city	207951	215573	3.536	0.520	213485	2.592	0.728
37	2785	Winston-Salem city	143485	148215	3.191	0.513	146388	1.983	0.619
39	0035	Akron city	223019	229527	2.835	0.683	226256	1.431	0.520
39	0865	Cincinnati city	364040	369165	1.388	0.631	372392	2.243	0.719
39	0900	Cleveland city	505616	512581	1.359	0.637	516598	2.126	0.650
39	0960	Columbus city	632910	639303	1.000	0.605	645256	1.913	0.630
39	1110	Dayton city	182044	188260	3.302	0.670	185861	2.054	0.624
39	4265	Toledo city	332943	335164	0.663	0.600	337317	1.297	0.497
40	1815	Oklahoma City city	444719	454958	2.251	0.516	454430	2.180	0.548
40	2465	Tulsa city	367302	375358	2.146	0.539	374856	2.015	0.597
41	0360	Eugene city	112669	114413	1.524	0.702	115726	2.641	0.685
41	0905	Portland city	437319	450413	2.907	0.538	445566	1.851	0.659
41	1005	Salem city	107786	109189	1.285	0.652	110240	2.227	0.546
42	0165	Allentown city	105090	105902	0.767	0.627	105216	0.120	0.831
42	3685	Erie city	108718	110075	1.233	0.662	109866	1.045	0.534
42	7180	Philadelphia city	1585577	1606249	1.287	0.609	1608942	1.452	0.742
42	7234	Pittsburgh city	369879	374002	1.102	0.583	373752	1.036	0.728
44	007065	Providence city	160728	161519	0.490	0.777	164304	2.176	0.829
46	1225	Sioux Falls city	100814	102712	1.848	0.658	101208	0.389	0.496
47	0245	Chattanooga city	152466	157807	3.385	0.528	153875	2.187	0.637
47	0760	Knoxville city	165121	170454	3.129	0.587	168582	2.053	0.698
47	0940	Memphis city	610337	640010	4.636	0.498	628329	2.864	0.709
47	1016	Nashville-Davidson (remainder)	488374	509302	4.109	0.519	499383	2.205	0.625
48	0015	Abilene city	106654	109869	2.926	0.515	108885	2.049	0.646
48	0100	Amarillo city	157615	162215	2.836	0.532	160530	1.816	0.577
48	0175	Arlington city	261721	272160	3.836	0.510	269098	2.742	0.608
48	0210	Austin city	465622	480242	3.044	0.501	483156	3.629	0.752
48	0520	Beaumont city	114323	118161	3.248	0.474	116654	1.998	0.500
48	0980	Corpus-Christi city	257453	264658	2.722	0.551	267127	3.622	0.788
48	1085	Dallas city	1006877	1057658	4.801	0.508	1043947	3.551	0.727
48	1340	El Paso city	515342	531606	3.059	0.637	538250	4.256	0.964
48	1500	Fort Worth city	447619	467853	4.325	0.490	461686	3.047	0.606
48	1580	Garland city	180650	185940	2.845	0.494	185336	2.528	0.539
48	1975	Houston city	1630553	1715633	4.959	0.542	1697301	3.933	0.777
48	2060	Irving city	155037	162091	4.352	0.530	160622	3.477	0.762
48	2400	Laredo city	122899	127296	3.454	0.793	126611	2.932	1.262
48	2565	Lubbock city	186206	192375	3.207	0.512	190661	2.336	0.688
48	2795	Mesquite city	101484	104448	2.838	0.503	103803	2.234	0.541
48	3200	Pasadena city	119343	123270	3.170	0.588	123539	3.380	0.721
48	3310	Plano city	128713	132377	2.768	0.519	131188	1.887	0.540
48	3745	San Antonio city	935933	964071	2.919	0.561	974099	3.918	0.857
48	4415	Waco city	103590	107015	3.201	0.476	106382	2.624	0.728
49	0870	Salt Lake City city	159936	162897	1.818	0.664	163014	1.888	0.721
51	0025	Alexandria city	111183	112748	1.388	0.541	114451	2.856	0.771
51	0242	Chesapeake city	151976	153512	1.001	0.356	155185	2.068	0.509
51	0590	Hampton city	133793	139284	3.942	0.459	137415	2.636	0.617
51	0860	Newport News city	170045	178053	4.498	0.468	175121	2.899	0.689
51	0875	Norfolk city	261229	273457	4.472	0.444	269011	2.893	0.733
51	0990	Portsmouth city	103907	108677	4.213	0.474	106837	2.742	0.695
51	1035	Richmond city	203056	209959	3.288	0.349	208987	2.838	0.817
51	1280	Virginia Beach city	393069	408213	3.710	0.487	402092	2.244	0.558
53	1140	Seattle city	516259	534576	3.427	0.506	528151	2.252	0.670
53	1220	Spokane city	177196	179308	1.178	0.711	179391	1.223	0.739
53	1280	Tacoma city	176664	180714	2.241	0.625	180831	2.304	0.622
55	1475	Madison city	191262	196296	2.565	0.734	193499	1.156	0.504
55	1665	Milwaukee city	628088	635933	1.234	0.601	642860	2.298	0.681

ORDER LIST

FRIDAY, OCTOBER 9, 1998

APPEAL-JURISDICTION NOTED

98-564 CLINTON, PRESIDENT, ET AL. V. GLAVIN, MATTHEW, ET AL.

The joint motion to expedite consideration of the jurisdictional statement and to set an expedited briefing schedule is granted. In this case, probable jurisdiction is noted. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, October 20, 1998. The briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, November 4, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before Tuesday, November 17, 1998. Rule 29.2 does not apply. The case is consolidated for oral argument on Monday, November 30, 1998, with No. 98-404, *Department of Commerce* v. *United States House of Representatives*, and a total of one and one-half hours are allotted for oral argument.

Supreme Court, U.S.
FILED
OCT 20 1998
CLERK

No. 98-564

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLANTS

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56 pp

QUESTIONS PRESENTED

1. Whether the instant challenge to the Secretary of Commerce's current plan for the year 2000 census presents a justiciable controversy satisfying the requirements of Article III of the Constitution.

2. Whether the Census Act, 13 U.S.C. 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

3. Whether the Secretary's plan for the 2000 census violates either Article I, Section 2 of the Constitution, or Section 2 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census. The appellees, who were plaintiffs in the district court, are Matthew Glavin; Robert Barr; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresanta; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn; and Cobb County, Georgia.[1]

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[1] In the district court, appellees filed two motions for leave to file an amended complaint naming additional plaintiffs. The first motion sought leave to add Delaware County, Pennsylvania, and DuPage County, Illinois, as plaintiffs. Appellees subsequently sought leave to add Bucks County, Pennsylvania. The district court did not rule on either motion. Although the district court's opinion refers at one point to Delaware County as though it were a plaintiff, see J.S. App. 11a, the list of plaintiffs included at the beginning of the court's opinion does not include any of those three counties, see *id.* at 1a.

On October 6, 1998, after the district court had issued its opinion and order, appellees filed in that court a motion to clarify that their earlier motions for leave to file an amended complaint had been granted. The district court has not ruled on the motion to clarify. Thus, while the government has never opposed the appellees' request to add the three counties named above as additional plaintiffs in this case, it does not appear that those counties are properly regarded as parties at the present time.

The following were intervenor-defendants in the district court: Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson; Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis Guitierrez; John Conyers, Jose Serrano; Cynthia McKinney; Charles Rangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee; Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Cudahy, California; City of Long Beach, California; City of San Bernardino, California; City of Detroit, Michigan; City of Bell, California; City of Gardena, California; City of Huntington Park, California; City of San Jose, California; City of Stamford, Connecticut; City of Oakland, California; County of Santa Clara, California; County of San Bernardino, California; County of Alameda, California; County of Riverside, California; State of New Mexico; State of Texas; National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California, Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles;

Hee-Sook Kim; Adeline M.L. Yoong; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra; U.S. Conference of Mayors; League of Women Voters of Los Angeles; Robert Menendez; Ed Pastor; Silvestre Reyes; Ciro Rodriguez; John Conyers, Jr.; and Carlos Romero-Barcelo. Pursuant to Rule 18.2 of the Rules of this Court, they are deemed parties in this Court.[2]

[2] Four groups of litigants—Richard A. Gephardt, et al.; the Legislature of the State of California, et al.; the City of Los Angeles, et al.; and the National Korean American Service & Education Consortium, Inc., et al.—moved for leave to intervene as defendants in the district court. The district court's opinion and order did not directly address the question whether the motions for intervention had been granted. See J.S. II n.1. On October 15, 1998, however, the district court issued an order granting the motions to intervene.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-564

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-22a) is not yet reported.

JURISDICTION

The opinion and order of the district court were entered on September 24, 1998. A notice of appeal (J.S. App. 37a-39a) was filed on September 25, 1998. The Court noted probable jurisdiction on October 9, 1998. J.A. 134. The jurisdiction of this Court rests on Section 209(e)(1) of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2482.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced as an appendix to the brief: Article I, Section 2, Clause 3 of the United States Constitution; Section 2 of the Fourteenth Amendment to the United States Constitution; 2 U.S.C. 2a (1994 & Supp. II 1996); 13 U.S.C. 141 and 195; and Section 209 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2480-2483.

STATEMENT

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* In addition, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

2. The Census Act states that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. 141(a). The "tabulation of total population by States" for the purpose of apportionment of Representatives is to be completed and reported by the Secretary to the President within nine months after the April 1 census date. 13 U.S.C. 141(b). Congress has also established the mechanism to be used in apportioning Representatives among the States after the census has been completed. Within one week after the beginning of the first Session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455 (1992). Under the apportionment law, "[e]ach State shall be entitled * * * to the number of Representatives shown in the statement" transmitted by the President. 2 U.S.C. 2a(b) (Supp. II 1996). Within 15 days after receiving that statement, the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." 2 U.S.C. 2a(b) (Supp. II 1996).

The Census Act authorizes the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a).[3] The Act further states that "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. 195.

"[T]he sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (1998 Appropriations Act), § 209(a)(2), 111 Stat. 2481. The decennial census

[3] The Bureau of the Census and its Director assist the Secretary in the performance of his duties under the Census Act. See 13 U.S.C. 2, 21.

has historically been used, however, to collect a variety of information in addition to the state-level population figures that are used in apportioning Representatives. "The Federal Government considers census data in dispensing funds through federal programs to the States, and the States use the results in drawing intrastate political districts." *Wisconsin* v. *City of New York*, 517 U.S. 1, 5-6 (1996). In order to facilitate the latter use of census data, the Census Act provides for the collection of population figures for geographical subdivisions within the States. 13 U.S.C. 141(c). The Act requires that "[t]abulations of population" for substate areas "shall be completed by [the Secretary] as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State." *Ibid.*

3. Each of the decennial censuses conducted in the United States is believed to have undercounted the country's actual population. *City of New York*, 517 U.S. at 6. The 1970, 1980, and 1990 censuses are estimated to have undercounted the population by 2.7%, 1.2%, and 1.6%, respectively. *Id.* at 6-7, 20. The Census Bureau has also concluded that members of certain demographic groups—including children under 18, renters (particularly in rural areas), and members of racial and ethnic minorities—are more likely to be missed in the census than are other persons, a phenomenon known as a "differential undercount." See Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress—The Plan for Census 2000*, at 2-3 (Aug. 1997) (*Report to Congress* or *Report*) (98-404 J.A. 48-49)[4]; *City of New York*, 517 U.S. at 7; J.S. App. 2a.

[4] References to "98-404 J.A." are to the joint appendix filed in No. 98-404, *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*.

In preparing for the 1990 census, the Commerce Department devoted extensive consideration to the possibility of using statistical sampling to address the undercount and differential undercount. The methodology considered by the Department involved an intensive postenumeration survey (PES) of particular representative geographical areas. By comparing the data obtained from the PES with the "raw" census figures for the same geographical areas, and by extrapolating the results of that comparison across the country as a whole, the Department produced adjusted census figures for each of the States and their political subdivisions. See *City of New York*, 517 U.S. at 8-10. For a variety of reasons, however, the Secretary ultimately determined that the unadjusted rather than the adjusted counts should be used as the official census figures. See *id.* at 10-12; 56 Fed. Reg. 33,582 (1991).[5] This Court upheld that decision against constitutional challenge. See *City of New York*, 517 U.S. at 24.

4. Much of the factual background of this case is set forth in the government's brief in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404. As that brief explains, the Department of Commerce has concluded that the use of statistical sampling mechanisms in the conduct of the 2000 decennial census will increase the accuracy of the census while reducing its cost. As directed by statute, see Pub. L. No. 105-18, Tit. VIII, 111

[5] In explaining his decision against adjustment of the 1990 census figures, the Secretary did not take the position that an adjustment would violate either the Constitution or the Census Act. To the contrary, he stated that "[w]hile not free from doubt, it appears that the Constitution might permit a statistical adjustment, but only if it would assure an accurate population count," 56 Fed. Reg. at 33,605; and he observed that "[w]hile judicial opinion is unsettled on the question * * *, the majority of courts considering this issue have ruled that [13 U.S.C. 195] permits an adjustment if the adjustment method makes the census more accurate," *id.* at 33,606.

Stat. 217, the Department forwarded the *Report to Congress*, which set forth the methods by which it plans to conduct the 2000 census. See 98-404 J.A. 34-147.

The *Report to Congress* described a variety of new mechanisms that the Census Bureau intends to use in order to improve its ability to obtain responses from individual residents in the initial phase of the census. 98-404 J.A. 73-80. It explained, for example, the Bureau's plan to develop a new Master Address File (MAF) superior to the address list used in the 1990 census. *Ibid.*[6] It described new outreach methods, including plans to make census forms available in public places such as malls, stores, and schools; and increased availability of forms in languages other than English. *Id.* at 77-79. The *Report* also explained the Census Bureau's plan to introduce new technologies designed to detect and eliminate multiple responses from the same household, thereby ensuring that the increased availability of census forms will not lead to overcounting of persons identified on more than one questionnaire. *Id.* at 79.

The *Report to Congress* explained, however, that such techniques alone would not be sufficient to obtain the most accurate population counts feasible. The *Report* therefore confirmed the Census Bureau's intention to make use of statistical sampling techniques that the Bureau had concluded would increase the accuracy of the 2000 census while reducing its cost. See 98-404 J.A. 81-98. Two forms of statistical sampling are at issue in this litigation.

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[6] Development of the MAF has been facilitated by the Census Address List Improvement Act of 1994, Pub. L. No. 103-430, 108 Stat. 4393. Section 2 of the Act authorizes designated local and tribal officials to review the MAF in order to assist the Census Bureau to identify any errors or omissions. 108 Stat. 4393; 13 U.S.C. 16; see 98-404 J.A. 219-220 (Census 2000 Operational Plan). Section 4 authorizes the United States Postal Service to share address lists with the Secretary of Commerce for use in conducting any census or survey. 108 Stat. 4394; 39 U.S.C. 412(b); see 98-404 J.A. 224.

First, the Commerce Department intends to use sampling in the Nonresponse Follow-Up (NRFU) phase of the census. In the 1990 census, only 65% of all U.S. households (as compared to 78% in 1970) returned the census forms sent to them by mail. 98-404 J.A. 52, 88. Census Bureau enumerators visited non-responding households as many as six times before relying on other means to attempt to ascertain the number of persons residing there. For the 2000 census, the Census Bureau plans to secure information from a randomly selected sample of non-responding households for each census tract, and to determine the likely number of persons living in other non-responding units in the same tract based on the sample data. *Id.* at 88-92.[7]

Second, after the initial phase of the census, the Commerce Department plans to conduct a survey of approximately 750,000 housing units furnishing a representative sample of a wide variety of demographic groups, defined by such categories as race, age, urban or rural place of residence, and status as a homeowner or renter. 98-404 J.A. 92-93. By comparing the results of that survey to those of the initial phase of the census, the Department will assess the frequency with which persons having particular demographic characteristics were missed in the initial phase. *Id.* at 94. Based on the results of the sample, the Bureau will determine population figures for States and political subdivisions nationwide. *Id.* at 94-98. The *Report to Congress* characterized that process, known as Integrated Coverage Measurement (ICM), as "the most critical" undertaking "[o]f all the innovations to improve accuracy in Census 2000." *Id.* at 92.

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[7] The Bureau's objective is to obtain actual responses from 90% of the housing units in each census tract before determining the likely number of persons living in the non-responding units. In order to achieve the 90% goal, the Bureau plans to contact a larger percentage of the households in tracts with lower mail response rates. See 98-404 J.A. 90-91.

The *Report to Congress* observed that the general methodology to be used in the ICM process had been "employed in the past two censuses to evaluate census quality." 98-404 J.A. 93. The *Report* explained, however, that "[t]he methodology has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country." *Ibid.* The *Report* noted that the sample used in the 2000 census would be much larger—750,000 housing units as opposed to 150,000—than the PES conducted in 1990 (see p. 5, *supra*). *Id.* at 94. The *Report* also explained that the ICM methodology projected for use in 2000, unlike the adjustment methodology considered in 1990, would not utilize data from one State to determine population figures in another State. *Ibid.*

After receiving the *Report to Congress*, Congress enacted the 1998 Appropriations Act. Section 209(b) of that Act provides that

> [a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

111 Stat. 2481. Section 209(c)(2) states that the *Report to Congress*, together with the Census Bureau's Census 2000 Operational Plan (see 98-404 J.A. 148-340), "shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding." 111 Stat. 2482. Section 209(e)(1) states that any civil action brought pursuant to the Act shall be heard by a three-judge

district court, whose decision is reviewable by appeal directly to this Court. *Ibid.*

5. The plaintiffs in this case (appellees in this Court) are 16 individuals and Cobb County, Georgia. They filed suit pursuant to the judicial review provision of Section 209(e)(1), contending that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act; Article I, Section 2 of the Constitution; and Section 2 of the Fourteenth Amendment. President William Jefferson Clinton, the Department of Commerce, the Secretary of Commerce, the Census Bureau, and the Acting Director of the Census Bureau (collectively Commerce Department) were named as defendants.[8]

The Commerce Department moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. Appellees moved for summary judgment. Appellees' claim of injury was substantially dependent on the proposition that particular States would be credited with a larger share of the country's population (or that particular counties would be credited with a larger share of their State's population) under a decennial census in the year 2000 that did not employ statistical sampling techniques. Appellees submitted the affidavit of Dr. Ronald E. Weber, who expressed the view that such areas can presently be identified with a reasonable degree of confidence. Dr. Weber noted that in 1992, the Census Bureau had published "a listing of Revised Net Undercount Rates ('NUR') for the 1990 census. The NUR are the factors that would have been used as

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[8] The President was not a proper defendant in this suit under Section 209(b) of the 1998 Appropriations Act, which seeks judicial review of what Section 209(c)(2) of that Act deems to be "final agency action" (the Census Bureau's *Report to Congress* and Operational Plan), and, we submit, injunctive relief was improperly entered against the President. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801, 802-803 (1992); *id.* at 825-829 (Scalia, J., concurring in part and concurring in the judgment).

multipliers to adjust the population numbers in the 1990 census." J.A. 61; see p. 5, *supra* (discussing Commerce Department's consideration, and ultimate rejection, of the use of statistically adjusted figures in the 1990 census). Dr. Weber concluded that the NUR published for the 1990 census furnished a reliable basis for predicting whether the use of sampling in the 2000 census would cause individual States or localities to be credited with a higher or lower percentage of the population than they would receive if the census were conducted without the use of sampling.[9]

Dr. Weber also asserted that he could identify those States that stand a substantial likelihood of being allocated fewer Representatives in the House of Representatives if sampling is used in the 2000 census than they would receive if sampling were not utilized. To make that determination, Dr. Weber relied on projections (the PPL-47 data set) issued by the Commerce Department in the fall of 1996 regarding the expected populations of individual States and localities as of July 2000. J.A. 62. Dr. Weber assumed that a 2000 census conducted without the use of sampling would produce state-level population figures consistent with the Department's projections. J.A. 63, 90. He then multiplied each

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[9] Dr. Weber explained:

> As nearly every analysis of the undercount in the census acknowledges, there are certain demographic characteristics which are related to the measured undercount. One of the largest components of this is race and Hispanic origin. More particularly, the main components of the NUR rely on the same demographic factors to be used pursuant to the Plan, including minority status, ethnicity, urban/rural place of residence, and owner/renter status. Therefore, areas which had high percentages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of these populations in 2000. While a variance in the minority population in these areas in 2000 might affect the degree of the measured undercount, it is unlikely to have a material effect on the direction of adjustment in these areas.

J.A. 61-62 (citation omitted).

State's population, thus determined, by the NUR derived from the 1990 census. J.A. 62, 89-90. Applying the method of equal proportions (see p. 3, *supra*) to each set of figures, Dr. Weber purported to identify those States for which there was a likelihood that their representation in the House would be affected by the choice between census methodologies. J.A. 62-63. He concluded that "it is a virtual certainty that Indiana will lose a seat" under the Bureau's plan (J.A. 65) and that "the States which stand a substantial likelihood of losing a seat are Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin" (J.A. 67). Dr. Weber apparently did not mean that all of those States were likely to lose a seat, however, for he stated in his conclusion that "[i]t is substantially likely that the state of Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, *or* Wisconsin will lose a seat in the House of Representatives" if sampling is used. J.A. 77 (emphasis added).

The government submitted its own affidavits contesting Dr. Weber's methodology and conclusions. See J.A. 92-110. One of the government's affiants, Signe Wetrogan, the Census Bureau's Assistant Division Chief for Population Estimates and Projections, "conclude[d] that no one can predict the state-by-state population of the United States as of April 1, 2000 with the exactitude required by the Method of Equal Proportions." J.A. 93. She specifically disputed Dr. Weber's assertion that Indiana would be virtually certain to lose a seat under the Census Bureau's planned sampling methodology, pointing out that he had based his prediction on outdated population data that overstated the projected population of Indiana by at least 42,000. J.A. 97-98. The government also pointed out that appellees, having moved for summary judgment on the merits, bore the burden of establishing (not merely alleging) their standing to sue. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 13 n.6, 45 (filed May 22, 1998).

6. The district court denied the Commerce Department's motion to dismiss and granted the appellees' motion for summary judgment. J.S. App. 1a-23a.

a. The district court began its discussion of standing by observing that "[i]n considering a motion to dismiss for lack of standing, the Court must accept all material allegations contained in the complaint as true and must construe all such allegations in favor of standing." J.S. App. 9a. The court then concluded that the appellees "have demonstrated that they will suffer injury as a result of the Department's plan, because they are able to calculate its effects by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000." *Id.* at 10a. It held that appellees "meet the [Article III] requirements of having a personal stake in the outcome of the controversy." *Ibid.*

The court identified four distinct categories of cognizable injuries. First, the court stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." J.S. App. 11a. Second, the court accepted the allegation "that the plan will dilute the voting strength of [appellees] at the intrastate level" because "several [appellees] reside in counties whose relative population will be diminished by operation of the Department's plan." *Ibid.* Third, the court held that appellees had properly alleged a cognizable injury in the form of loss of federal funding to the areas in which they reside. *Id.* at 11a-12a.

Finally, the district court concluded that the appellees would be injured by the Commerce Department's plan for the 2000 census because if the plan is implemented and the census is subsequently declared invalid by a reviewing court, "any elections in 2002 will have to be held on the basis of an

incorrect number of representatives and malapportioned districts which reflect the 1990 census results." J.S. App. 12a. The court considered it "virtually certain" that Georgia will be entitled to receive at least one additional congressional seat after the 2000 census (as compared to its current allotment) regardless of what census methodology is used. *Ibid.* The court stated that the appellees who are Georgia residents "will have their votes diluted if they are forced to participate in an election in 2002 in which Georgia does not have the additional seat in Congress." *Ibid.* The court also concluded that "[t]his same injury will be visited upon the county [appellees] that have enjoyed a higher rate of population growth than their states since 1990." *Ibid.*

The court further held that the alleged injuries were sufficiently immediate and certain to occur to satisfy Article III requirements, J.S. App. 7a-9a, and that those injuries were properly attributable to the Commerce Department, *id.* at 14a-15a.

b. On the merits, the district court held that the use of statistical sampling in determining the population for purposes of apportioning Representatives among the States would violate the Census Act. The court stated that "Congress has spoken precisely to the question of statistical sampling by the Department and, in plain language, prohibited the use of this methodology to derive the population used for purposes of congressional apportionment." J.S. App. 16a-17a. The court construed the opening proviso of 13 U.S.C. 195 as unambiguously prohibiting the use of sampling for apportionment purposes. J.S. App. 18a-19a. Insofar as that prohibition might conflict with the affirmative grant of authority to use sampling contained in 13 U.S.C. 141(a), the court reasoned that Section 195 is the more specific of the two provisions and should therefore prevail. J.S. App. 20a. The court concluded that "the only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment and Section 141

allows it for all other purposes." *Id.* at 21a. The district court issued an order stating that the Commerce Department was "permanently enjoined from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment." *Id.* at 23a.

c. Because the district court concluded that the Secretary's plan for the 2000 census violates the Census Act, it declined to resolve the question whether the plan is consistent with Article I, Section 2, Clause 3 of the Constitution, or with Section 2 of the Fourteenth Amendment. J.S. App. 16a-17a & n.2, 21a.

SUMMARY OF ARGUMENT

1. Appellees cannot establish that any of the States in which they reside is likely to lose a seat in the House of Representatives as a result of the Census Bureau's plan to utilize statistical sampling in the 2000 census. To begin with, appellees cannot show that particular States will be credited with smaller shares of the population under the Bureau's plan than they would receive if the census were conducted without the use of sampling. The district court based its contrary view on the premise that the Bureau's plan for the year 2000 is essentially equivalent to the statistical adjustment methodology proposed (and ultimately rejected) for the 1990 census. The court's analysis ignores the substantial differences between the techniques (both sampling and nonsampling) projected for use in the year 2000 and the methods employed in 1990.

Even if sampling were certain to cause a particular State to be credited with a smaller share of the country's population, it would not follow that that State is likely to lose a Representative. Relying on population projections issued by the Census Bureau, appellees' affiant Dr. Ronald E. Weber purported to identify one State that was virtually certain to

lose a seat in the House of Representatives, and six other States that had a substantial likelihood of doing so. As a government declarant explained, however, that methodology was severely flawed, both because Dr. Weber failed to use the best available data, and because even the best data available at the present time are not sufficiently precise to permit a confident prediction regarding the apportionment of Representatives among the States under a census to be conducted in the year 2000.

The district court's disposition of the case is particularly untenable because the government's evidentiary submissions directly controverted Dr. Weber's methodology and conclusions. Because standing is an essential element of a plaintiff's case, the district court was authorized to enter judgment in appellees' favor only if there was no genuine dispute of material fact regarding their standing to sue. On the existing record, the district court had no basis for making that determination.

2. Appellees cannot establish standing based on the expected effects of the 2000 census on intrastate redistricting or the distribution of federal funds. Appellees' only colorable statutory or constitutional claim is that sampling may not be used for purposes of apportioning Representatives among the States. The Census Act and the Constitution plainly permit the use of sampling for other purposes, including intrastate redistricting and fund allocation. Insofar as appellees claim to suffer a diminution in intrastate electoral power, or a loss of federal largesse, their injury is not fairly traceable to the alleged violation of law. For much the same reason, appellees cannot satisfy Article III's redressability requirement, since they have made no effort to establish that the Secretary is likely to forgo the use of sampling for other purposes if he is prohibited from using sampling for apportionment.

3. The district court also held that appellees are likely to be injured by the Secretary's plan if the 2000 census is set

aside in its entirety and the 1990 census figures continue in effect. The harm they posit, however, would be traceable not to the plan itself, but to a remedial order issued in a (hypothetical) future lawsuit. In any event, that harm is highly unlikely to take place. In fashioning a remedy for a constitutional or statutory violation, a federal court exercising equitable powers should strive, to the extent possible, to replicate the conditions that would have been present if no violation of law had occurred. Because both the Constitution and the Census Act require that a census of the population be conducted at least once within every ten-year period, a judicial order mandating continued reliance on 1990 census figures would be in considerable tension with that remedial principle.

ARGUMENT

APPELLEES LACK STANDING TO BRING THIS SUIT

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). To satisfy the requirements of Article III, "a plaintiff must, generally speaking, demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). Appellees cannot satisfy those requirements.

A. Appellees Have Failed To Identify Any State That Would Be Likely To Lose A Seat In The House Of Representatives As A Result Of The Census Bureau's Plan To Utilize Statistical Sampling In The 2000 Census

The district court stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota,

Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." J.S. App. 11a. That conclusion appears to have been based on the affidavit of Dr. Ronald E. Weber, who identified the six States listed above as "States which stand a substantial likelihood of losing a seat" if the Census Bureau's plan is implemented. J.A. 67.[10] The district court's conclusion was not justified by the record. Appellees have failed to establish that any of the States listed above is likely to be allotted fewer Representatives if the Bureau's plan is implemented than it would receive if the 2000 census were conducted without the use of sampling. The district court's holding is particularly untenable because the court granted appellees' motion for summary judgment, despite the fact that the government submitted declarations controverting Dr. Weber's methodology and conclusions.

1. The district court read Dr. Weber's declaration to assert that *all* of the States listed above would be likely to lose a Representative if sampling is utilized. Dr. Weber stated in his conclusion, however, only that "[i]t is substantially likely that the State of Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, *or* Wisconsin will lose a seat in the House of Representatives because of the Departments's Plan." J.A. 77 (emphasis added). In other words, Dr. Weber seemed to be expressing the view that there was a substantial likelihood that *one* of those States would lose a

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[10] Dr. Weber also stated that "it is a virtual certainty that Indiana will lose a seat, dropping from ten seats under a traditional enumeration to nine under the Department's Plan." J.A. 65. That statement was directly controverted by one of the declarations submitted by the government. See pp. 23-24 & note 13, *infra*. One of the appellees, Gary A. Hofmeister, is a resident of Indiana. The district court did not allude to the possibility that Indiana will be allotted fewer Representatives if the Bureau's plan is implemented than the State would receive if the 2000 census were conducted without the use of sampling.

seat, but without specifying which one. Thus, the Weber affidavit does not furnish a basis for finding a substantial likelihood that the individual appellees who reside in any one of those six States would actually lose a Representative, and thereby have their votes diluted.

2. To show that a particular State would be likely to lose a Representative under the Bureau's plan, appellees would first be required to demonstrate that the State would probably be credited with a smaller percentage of the country's population if the Bureau's plan is implemented than if the census were conducted without the use of sampling. The district court concluded that appellees had met that burden "because they are able to calculate [the] effects [of the Bureau's plan] by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000." J.S. App. 10a. The court's analysis is seriously flawed.

To begin with, the district court's effort to equate the adjustment methodology used to calculate national undercount rates (NUR) for the 1990 census with the Census Bureau's plan for the year 2000 ignores the substantial differences between the two. Those differences are discussed both in the Commerce Department's 1997 *Report to Congress* and in the Declaration of John H. Thompson, the Bureau's Associate Director of the Decennial Census (J.A. 100-110), which was submitted by the government to the district court. As those documents explain, the Bureau has devised significant innovations for use in the initial phase of the census in order to increase the percentage of the population that completes and returns census questionnaires. Those include a Master Address File based, *inter alia*, on the United States Postal Service address list (see p. 6 and note 6, *supra*); a paid advertising campaign; plans to make census forms available in public places such as malls, stores, and schools; increased availability of census forms in languages

other than English; and new unduplication technologies designed to ensure that the increased availability of census forms will not lead to overcounting of persons identified on more than one questionnaire. See 98-404 J.A. 73-80 (*Report to Congress*); J.A. 103-104 (Thompson Declaration).

The *Report to Congress* also makes clear that the Integrated Coverage Measurement (ICM) operation planned for use in the 2000 census represents a substantial improvement on the adjustment methodology used in 1990. See 98-404 J.A. 93 (stating that the adjustment methodology used in the 1990 census "has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country"). The *Report* explained that the sample used in the 2000 census will be five times as large—750,000 housing units as opposed to 150,000—as the PES conducted in 1990. *Id.* at 94. The *Report* also noted that the ICM methodology projected for use in 2000, unlike the adjustment methodology considered in 1990, will not utilize data from one State to determine population figures in another State. *Ibid.*

Dr. Weber made no effort to compare the methods (sampling or non-sampling) used in the 1990 census with those projected for use in the year 2000. Rather, his conclusion that the 1990 NUR would likely be replicated in the 2000 census was explained as follows:

> As nearly every analysis of the undercount in the census acknowledges, there are certain demographic characteristics which are related to the measured undercount. One of the largest components of this is race and Hispanic origin. More particularly, the main components of the NUR rely on the same demographic factors to be used pursuant to the Plan, including minority status, ethnicity, urban/rural place of residence, and owner/renter status. Therefore, areas which had high percent-

> ages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of these populations in 2000. While a variance in the minority population in these areas in 2000 might affect the degree of the measured undercount, it is unlikely to have a material effect on the direction of adjustment in these areas.

J.A. 61-62 (citation omitted). Dr. Weber thus assumed that (1) any geographic area having a higher than average concentration of minority residents would likely benefit (*i.e.*, be credited with a higher share of the country's population) from the use of statistical sampling in the 2000 census, and (2) any geographic area that had a higher than average concentration of minority residents in 1990 is likely to have the same demographic characteristics in 2000. Neither of those propositions is supported by record evidence introduced in this case.

Because members of racial minority groups have historically been undercounted at a disproportionately high rate (see p. 4, *supra*), it is reasonable to suppose that, *as a general matter*, areas of the country with higher than average minority populations would benefit from the use of statistical sampling mechanisms designed in part to address the differential undercount. The results of the 1990 census, however, indicate that the correlation is significantly less precise than Dr. Weber's affidavit suggests. As the government's reply brief in *City of New York* explained, "States such as Illinois, New Jersey, and New York * * * have large minority populations, and all three would have lost population share if the proposed [statistical] adjustment had been made." Nos. 94-1614, et al. Gov't Reply Br. at 20 n.17 (*City of New York*). Two experts have determined that in the 1990 census, "[u]rban blacks ha[d] an undercount three times that of the rest of the population, according to the PES; but 55% of them live[d] in states that would lose

population share if the adjustment were implemented." D. Freedman & K. Wachter, *Rejoinder*, 9 Stat. Sci. 527, 537 (1994). Appellees made no effort to quantify the degree to which States with high minority populations would actually have benefitted from the adjustment proposed for the 1990 census.

Moreover, neither Dr. Weber's affidavit nor any other evidentiary materials submitted by appellees supports the assertion that, "[t]herefore, areas which had high percentages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of those populations in 2000." J.A. 61-62. Appellees presented no evidence regarding the racial demographics—past or present—of the States in which they reside. For that reason, Dr. Weber's use of the word "[t]herefore" at the beginning of the sentence quoted above is particularly inexplicable. The statement that "areas which had high percentages of minority or ethnic populations in 1990 would also be substantially likely to have high percentages of those populations in 2000" may or may not be true, but it does not follow in any way from the preceding statements in Dr. Weber's affidavit or from any other evidence in the record.

3. As Dr. Weber recognized, if the 1990 census figures had been statistically adjusted in accordance with the 1992 NUR, and the method of equal proportions had been applied to the adjusted state-level population totals, only one State (Wisconsin) would have lost a seat in the House of Representatives (as compared to the apportionment of Representatives that actually occurred using the unadjusted figures). J.A. 66. Thus, even if the individual appellees could demonstrate a likelihood that each of the States in which they reside would be credited with a smaller share of the country's population under the Census Bureau's plan for the 2000 census, it would not follow that any of those States is likely to lose a Representative. In purporting to identify States that, in his view, stand a substantial likelihood of

having their allotment of seats in the House of Representatives affected by the choice between census methodologies, Dr. Weber relied on a set of figures (the PPL-47 data set) issued by the Commerce Department in the fall of 1996, which projected the numbers of people that would reside in each State on July 1, 2000. J.A. 62. Dr. Weber assumed that a census conducted without the use of sampling would produce state-level population figures identical to those projected numbers. J.A. 63, 90. He then multiplied each State's population (so determined) by that State's "adjustment multiplier" (a reciprocal factor of the State's NUR) as derived from the 1990 PES. J.A. 89-90 & n.1. Dr. Weber applied the method of equal proportions (see p. 3, *supra*) to both sets of state-level population figures. J.A. 62-63. On that basis he concluded that "it is a virtual certainty that Indiana will lose a seat," and that six other States "stand a substantial likelihood of losing" one, if the Census Bureau's plan is implemented. J.A. 65, 67.

The government submitted the Declaration of Signe I. Wetrogan (J.A. 92-99), the Census Bureau's Assistant Division Chief for Population Estimates and Projections, who discussed the errors in Dr. Weber's analysis. While Ms. Wetrogan did not suggest that Dr. Weber had improperly applied the method of equal proportions in performing his calculations, she did explain that the data on which Dr. Weber had relied were substantially flawed. Ms. Wetrogan first explained that the PPL-47 projections for the year 2000 are not the best available data, since those projections were based on the Bureau's July 1, 1994, population estimates, which had already been superseded at the time that Dr. Weber executed his affidavit.[11] Ms. Wetrogan also empha-

[11] As the Wetrogan declaration explains, the Census Bureau produces both population estimates and population projections. "Estimates use a variety of existing sources to come to a reasoned conclusion about the population of a given governmental unit at some specified point in the past." J.A. 93. "Projections use the latest available national and state estimates as the starting point, and then project the population in the future based on assumptions about fertility, mortality and internal and international migration trends." J.A. 94.

As explained above, Dr. Weber based his analysis on the PPL-47 projections, issued in October 1996, for the expected population of the various States as of July 1, 2000. The PPL-47 projections were themselves based on Census Bureau estimates of the population as of July 1, 1994. J.A. 95. The PPL-47 data set also included projections for the population as of July 1, 1997. See J.A. 97. By the time that Dr. Weber executed his affidavit, however, the Bureau had released population estimates for July 1, 1997, which differed in substantial respects from the earlier PPL-47 projections for the same date. J.A. 95-96. Ms. Wetrogan explained that "[h]ad Dr. Weber incorporated the 1997 estimates into his projections he would have produced very different results. Significant population shifts among states occurred in the 1994-1997 time period that would have significantly changed Dr. Weber's projections." J.A. 96. Those shifts "include[d] a sizeable increase in California's population, as that State pulled out of an economic downturn, and the shift in population trends in the New England states." *Ibid.*

sized that even if the best available data had been used, the populations of individual States in the year 2000 could not be forecast with the degree of precision necessary to predict with confidence the apportionment of Representatives under the method of equal proportions.[12] Ms. Wetrogan directly took issue with Dr. Weber's assertion that Indiana is "a

[12] Ms. Wetrogan explained:

> By saying that Dr. Weber used outdated and incomplete information to prepare his projections I do not mean to imply that there are numbers that Dr. Weber or anyone else could have used to prepare exact projections for the year 2000. The most important point I wish to make in this Declaration is that projections are inherently imprecise and subject to change. Projections are useful planning tools but they are not exact. As discussed above, significant population change occurred in the 1994-1997 time period. These trends could continue at the same rate in the 1997-2000 time period, they could halt, or they could accelerate. Wholly different migration trends could develop. The Census Bureau prepares projections for planning purposes but it cannot predict exact population totals.

virtual certainty" to lose a seat under the Census Bureau's plan, explaining that the Bureau's current projections of Indiana's population in the year 2000 are substantially lower than the outdated projections on which Dr. Weber relied.[13]

4. Dr. Weber's conclusion that specified States were likely to lose Representatives under the Census Bureau's plan was based on his determinations that (a) a census conducted without the use of sampling would likely produce state-level population figures closely approximating those contained in the PPL-47 projections for July 1, 2000, and (b) the uses of sampling contemplated by the Bureau's plan would affect the relative population shares of the various States in substantially the same manner as the adjustment methodology devised in connection with the 1990 census. As the foregoing discussion makes clear, the declarations submitted by the government directly controverted each of those assertions. The government also pointed out that appellees, having moved for summary judgment on the merits, bore the burden of establishing their standing to sue. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 13 n.6, 45 (filed May 22, 1998).

The district court's opinion contains no reference to the government's evidentiary submissions or to appellees' burden at the summary judgment stage. Rather, the court focused on appellees' *allegations* and appeared to believe that in order to reach and resolve the merits of appellees' statutory and constitutional challenge to the census, it only had to

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J.A. 96-97. She concluded that "[n]o one can predict state populations three years from now with the exactitude required by the method of equal proportions." J.A. 97.

[13] Ms. Wetrogan explained that the Census Bureau "now estimate[s] Indiana's population for 1997 to have been significantly below our projection for 1997 in PPL-47. We have produced eight different projections of Indiana's population in 2000 * * * . In each of these eight projections Indiana's population total would be at least 42,000 people less than was projected in PPL-47." J.A. 97-98.

dispose of the government's motion to dismiss the complaint for lack of standing. Thus, the court began its discussion of the standing issue by observing, correctly, that "[i]n considering a motion to dismiss for lack of standing, the Court must accept all material allegations contained in the complaint as true and must construe all such allegations in favor of standing." J.S. App. 9a.[14]

Later in its opinion, the court did state that the appellees "have demonstrated that they will suffer injury as a result of the Department's plan, because they are able to calculate its effects by reference to the results of the Post-Enumeration Survey completed in 1992, which closely mirrors the methodology the Department will utilize as part of its plan for Census 2000." J.S. App. 10a. The court also stated that the appellees include "individual taxpayers in Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin, all [of] which are substantially likely to lose a seat in the House of Representatives solely because of the implementation of the Department's plan." *Id.* at 11a.

The import of the latter two statements is unclear. In context, it appears that the court was merely identifying the manner in which appellees had amplified their allegations of injury, and explaining why (in the court's view) their complaint withstands the government's motion to dismiss. In other words, the court may simply have meant that, if the

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[14] See also J.S. App. 9a ("in the context of a motion to dismiss * * * courts 'presume that general allegations embrace those specific facts that are necessary to support [each] claim'") (quoting *Bennett* v. *Spear*, 520 U.S. 154, 168 (1997)); J.S. App. 9a ("General factual allegations of injury * * * may suffice."); *id.* at 10a (referring to "allegations" and "claims" of vote dilution; individuals have standing to "allege" vote dilution); *id.* at 11a ("Plaintiffs allege threatened injury in the form of loss of federal funds."); *id.* at 14a-15a ("[A]llegations of decreased federal and state funding is fairly traceable to population counts reported in the decennial census."); *id.* at 15a ("Redressability focuses on whether judicial intervention will provide an adequate remedy for a plaintiff's alleged injuries.").

appellees' allegations were taken as true, appellees were likely to suffer injury in fact in the form of diminished representation in Congress. Conceivably, the district court may have actually compared Dr. Weber's affidavit with the government's declarations and concluded that the former was more credible, although as noted above the court did not even mention the government's declarations.

Neither of those determinations, however, would provide an adequate basis for the district court's decision to enter summary judgment in appellees' favor. "The party invoking federal jurisdiction bears the burden of establishing" that it satisfies the standing requirements of Article III. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And "[s]ince they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, [the elements of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Ibid.* Appellees were therefore entitled to summary judgment only if there was no genuine dispute of material fact regarding their standing to sue. Because the government's declarations directly controverted Dr. Weber's methodology and conclusions, the district court erred in holding that appellees had established standing based on a likelihood of diminished representation in Congress.[15]

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[15] The government pointed out in the district court that Dr. Weber appears to lack the qualifications to testify as an expert witness under Federal Rule of Evidence 702 concerning the subject matter of his affidavit, see Defendants' Reply Memorandum in Support of Motion to Dismiss at 15 (filed May 22, 1998), but the district court made no ruling as to his qualifications. Dr. Weber is neither a statistician nor a demographer. Rather, he claims expertise in "U.S. state political behavior and public policy-making," and he has apparently served as a consultant and expert witness in a number of federal redistricting and voting rights cases. J.A. 57-58. Dr. Weber also claims to have "extensive experience using U.S. Bureau of the Census data to develop redistricting plans for local and state governments and providing assistance in obtaining preclearance of redistricting plans pursuant to Section 5 of the Voting Rights Act of 1965, as amended in 1982." J.A. 58. Dr. Weber thus appears to possess significant expertise concerning the processes by which *established* population figures are used to draw congressional and state legislative districts. Neither his curriculum vitae nor his affidavit suggests, however, that Dr. Weber possesses any expertise concerning the processes by which population figures are derived in the first instance.

Because Federal Rule of Civil Procedure 56(e) requires that affidavits either supporting or opposing a motion for summary judgment "shall show affirmatively that the affiant is competent to testify to the matters stated therein," we believe that appellees have failed even to demonstrate the existence of a genuine issue of material fact concerning their standing to sue. But even if Dr. Weber is determined to be competent to testify regarding the matters discussed in his affidavit, the district court erred in granting summary judgment for appellees in light of the government's evidentiary submissions.

B. Appellees Cannot Establish Standing Based On The Expected Effects Of The 2000 Census On Intrastate Redistricting Or The Distribution Of Federal Funds

The district court also found that appellees had established standing to sue based on the anticipated effect of the Bureau's plan for the 2000 census on intrastate redistricting and on the distribution of federal funds. See J.S. App. 11a-12a. That holding too was erroneous.

1. As an initial matter, with respect to intrastate redistricting and federal fund distribution, appellees could establish injury in fact resulting from the use of sampling in the 2000 census only if they established that the States or substate areas in which they reside will likely be credited with a smaller percentage of the population than those regions would receive if sampling were not utilized. For the reasons stated in Part A above, appellees have not demonstrated a likelihood of such a loss, and their claim of injury

based on intrastate redistricting and federal funding must fail for that reason alone.

There are additional flaws in the district court's reasoning regarding those alleged injuries. The district court's conclusion that the counties in which several of the individual appellees reside will have their relative shares of their respective States' populations reduced if sampling is used is not of constitutional significance with respect to intrastate redistricting. Members of Congress and state legislators represent people, not counties. See *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964) ("Legislators represent people, not trees or acres."). The fact that a county's relative share of the State's population might be reduced if sampling is used does not mean that the vote of any particular resident of the county will necessarily be diluted. As a result of the one-person one-vote requirement, the boundaries of a congressional or other legislative district within a State will almost never coincide precisely with those of a county. Accordingly, some persons who reside in a county for which the relative share of the State's population would be reduced if sampling is used might be placed in a district that includes all or part of one or more other counties whose relative shares of the State's overall population would be increased by the use of sampling. Thus, even a showing that the particular county in which any of the individual appellees resides will find its relative share of the State's population decreased would be insufficient to establish standing.

The district court also too readily assumed injury resulting from the loss of federal funding. No States are plaintiffs in this case, so there is no claim of injury based on the loss of funds to a State as a result of the use of sampling. Appellees did submit affidavits of officials of Delaware County, Pennsylvania, and Cobb County, Georgia, which listed federal grant programs through which those Counties received federal funds and under which (the affidavits asserted) population is a determining factor in the allocation

of grants. See J.A. 80-82, 86-88. The government, however, submitted declarations of knowledgeable officials in the federal agencies responsible for those programs stating that, for five of the programs, federal law either does not use population at all, or that it is only one of a number of factors used, in the federal agencies' allocation of grants. See Gov't Exhs. 15-19. And although the States' relative shares of the Nation's population provide the basis for allotment of funds under the sixth program identified by appellees (the Social Service Block Grant (SSBG) program authorized by Title XX of the Social Security Act, 42 U.S.C. 1397), the declaration of the federal official responsible for that program explained that the SSBG program does not require that a State distribute funds within the State on the basis of population. See Gov't Exh. 19. See generally Defendants' Reply Memorandum in Support of Motion to Dismiss at 27-36 (filed May 22, 1998).[16]

2. Moreover, in order to satisfy the standing requirement of Article III, it is not sufficient that a plaintiff demonstrate injury (or a likelihood of injury) in fact. The plaintiff must establish in addition that his injury is "fairly traceable to the challenged action of the defendant" and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-561 (ellipsis, brackets, and internal quotation marks omitted). Appellees cannot meet those requirements.

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[16] Appellees also submitted the affidavit of an official of DuPage County, Illinois, that listed current grants to the County as of March 1998. J.A. 83-85. The affidavit stated that some of the listed items include federal and state grants for which the population of the county is a determining factor in the calculation of the amount of the grant received. J.A. 83. The affidavit did not identify which grants fell in that category, however, or aver that the County's share of funds (either as to a particular program, or overall) would be reduced if sampling is used in the 2000 census. See Defendants' Reply Memorandum in Support of Motion to Dismiss at 29 n.11 (filed May 22, 1998).

Even under their own legal theory, neither the Census Act nor the Constitution prohibits the use of sampling in determining the population figures that will be used in intrastate redistricting or in the distribution of federal funds. Rather, the gravamen of appellees' legal claim is that the Act and the Constitution forbid the use of sampling-derived figures to determine the number of Representatives to which each State is entitled. Neither appellees' claimed diminution in intrastate electoral power, nor the asserted loss of federal funds to the States or counties in which they reside, is "fairly traceable" to the use of sampling in the apportionment of Representatives among the States. Appellees have made no effort, moreover, to show that those injuries would be redressed by a district court order directing that sampling not be used in the apportionment process.

a. The Census Act specifically authorizes the Secretary to employ "sampling procedures" in the conduct of the "decennial census of population." 13 U.S.C. 141(a). The district court held that Section 141(a)'s authorization to use sampling has been withdrawn, for purposes of apportioning Representatives among the States, by 13 U.S.C. 195. Section 195 states: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

Though the parties to this case disagree as to the proper interpretation of Section 195's opening proviso, it is undisputed that the Census Act authorizes the Secretary to utilize sampling for purposes other than the apportionment of Representatives among the States. See J.S. App. 21a (district court concludes that "Section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes"). Consistent with that understanding, the district court did not bar all use of sampling in the 2000 census, but instead enjoined the Commerce Department only "from

using any form of statistical sampling, including their program for non-response follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment." *Id.* at 23a.

The sole constitutional function of the census is to determine the "respective Numbers" of "the several States" so that the reapportionment of Representatives may be effected in accordance with Article I, Section 2 Clause 3. See 1998 Appropriations Act, § 209(a)(2), 111 Stat. 2481 (congressional apportionment is "the sole constitutional purpose of the decennial enumeration"). For that reason, the only information that the census is constitutionally required to produce is the "whole number of persons in each State." U.S. Const. Amend. XIV, § 2. Although the Census Act directs the Secretary to determine population figures for substate areas, see 13 U.S.C. 141(c), the Constitution does not require federal officials to prepare such data at all, much less to employ a particular methodology in doing so. The Constitution similarly does not require either that federal financial assistance to States or localities must be distributed on the basis of population, or that the population must be determined in any particular manner in the event that Congress elects to allocate funds on that basis.

In short, neither the Census Act nor the Constitution can plausibly be thought to bar the use of statistical sampling in deriving the population figures that will be employed in intrastate redistricting or the distribution of federal funds. Rather, the only colorable challenge to the Bureau's plan for the 2000 census—and the only challenge the district court upheld—is the claim that sampling may not be used for the apportionment of Representatives among the States. Insofar as appellees claim to suffer a diminution in intrastate electoral power, or a loss of federal largesse, their injury is not "fairly traceable" to the alleged violation of law. Cf. *Lewis* v. *Casey*, 518 U.S. 343, 357-358 & n.6 (1996) (even where a plaintiff is injured by one aspect of a government

program, the reviewing court lacks authority to enjoin other aspects of the program that do not cause the plaintiff harm).

b. For much the same reason, appellees cannot satisfy Article III's redressability requirement with respect to any claim of injury that is not based on the apportionment of Representatives among the States. Under the terms of the district court's order, the Census Bureau remains free to utilize statistical sampling for all purposes other than the apportionment of Representatives among the States. See J.S. App. 23a. Indeed, regardless of the meaning that is ascribed to Section 195's opening proviso, the rest of Section 195 unambiguously *requires* the Secretary to utilize sampling for purposes other than apportionment "if he considers it feasible."

If the district court's holding is affirmed on the merits, the Census Bureau will be required to conduct a decennial census, without the use of sampling, to determine the state-level population figures that will be used in apportioning Representatives among the States. Such a ruling, however, would not prevent the Secretary from using sampling for other purposes in the conduct of the decennial census. Appellees have offered no basis on which this Court could find that it is "likely, as opposed to merely speculative," *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks omitted), that the Secretary would conclude that it is not "feasible" to use sampling for other purposes. Appellees have therefore failed to establish that their alleged injury based on intrastate redistricting and federal funding is redressable by a favorable judicial decision.

C. Appellees Cannot Establish Standing Based On Speculation That The 2000 Census Will Be Set Aside In Its Entirety If Sampling Is Utilized

The district court also concluded that "[t]he Department's failure to conduct a proper enumeration may injure [appellees] where in the absence of population figures that comply

with federal law, any elections in 2002 will have to be held on the basis of an incorrect number of representatives and malapportioned districts which reflect the 1990 census results." J.S. App. 12a. The court stated that Georgia will be "virtually certain" to receive an additional seat in the House of Representatives (as compared to its current allotment) under the 2000 census, regardless of how that census is conducted. *Ibid.* The court believed that the appellee Georgia residents "will have their votes diluted if they are forced to participate in an election in 2002 in which Georgia does not have the additional seat in Congress." *Ibid.* The court also stated that residents of substate areas whose populations are expected to increase between 1990 and 2000 at a rate greater than that for other substate areas will suffer analogous injuries with respect to intrastate redistricting and distribution of federal funds if the 2000 census is invalidated and 1990 census figures continued to be used for those purposes. *Id.* at 12a-13a.

The injuries hypothesized by the district court would not be the result of the use of sampling in and of itself. The appellee Georgia residents, for example, do not contend that their State will be credited with a smaller share of the country's population if sampling is utilized in the 2000 census than if the census is conducted without the use of sampling. Indeed, the PES undertaken in conjunction with the 1990 census determined that the State of Georgia had an undercount in excess of the national average, see J.A. 115, and Georgia would therefore have *gained* population share if the proposed statistical adjustment had been implemented. Rather, the appellee Georgia residents contend that they are likely to be injured by a judicial order, entered in a hypothetical future lawsuit, requiring that the results of the 2000 census must be ignored in reapportioning Representatives among the States for the 2002 elections. Neither appellees nor the district court has identified any case suggesting that such an injury may be regarded as "fairly traceable," for

purposes of Article III standing, to the conduct of the defendant challenged in *this* lawsuit.

Moreover, even if such a theory could under some circumstances satisfy Article III requirements, it is untenable as a basis for standing in the instant case. The district court's analysis rests on the implicit premise that if the decennial census for the year 2000 is conducted in accordance with the Census Bureau's current plan, and if a reviewing court subsequently declares the use of sampling to have been unlawful, the appropriate remedy will be to set the census aside in its entirety and mandate continued reliance on the 1990 population figures. The district court offered no basis for that conclusion, and the remedy it posits is a most improbable one. In fashioning a remedy for a constitutional or statutory violation, a federal court exercising equitable powers should strive, to the extent possible, to replicate the conditions that would have been present if no violation of law had occurred. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 87 (1995); *Milliken* v. *Bradley*, 433 U.S. 267, 280-282 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 769-770 (1976). Because both the Constitution and the Census Act require that a census of the population be conducted at least once within every ten-year period, see U.S. Const. Art. I, § 2, Cl. 3; 13 U.S.C. 141(a), a judicial order mandating continued reliance on 1990 census figures would be in considerable tension with that remedial principle, even if a reviewing court were to conclude that the use of sampling for purposes of apportionment was contrary to law.

Thus, if Georgia's population has grown so substantially that the State is "virtually certain" to gain a seat in the House of Representatives under any 2000 census methodology, there is no reason to assume that the district court in a hypothetical suit filed after completion of the 2000 census would deny the State that additional seat by requiring continued use of 1990 census figures across the board in apportioning Representatives among the States for the 2002

congressional elections. Appellees' claim of harm is even less tenable with respect to intrastate redistricting and allocation of federal funds. Because neither the Census Act nor the Constitution is alleged to prohibit the use of sampling for purposes of redistricting or fund distribution, see pp. 30-31, *supra*, it is particularly farfetched to suppose that a federal court would enjoin the use for those purposes of census figures determined in accordance with the Bureau's current plan.

* * * * *

On the merits, the district court held that 13 U.S.C. 195 prohibits the use of sampling for the purpose of apportioning Representatives among the States, and that the Census Bureau's plan for the 2000 census is therefore contrary to law. For the reasons stated at pages 25-39 of our opening brief in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404, that holding was erroneous. Our opening brief in that case also explains (at 39-49) that the use of sampling in the conduct of the decennial census is fully consistent with the requirement of Article I, Section 2, Clause 3 of the Constitution that apportionment of Representatives be based upon an "actual Enumeration" of the population. If this Court concludes that appellees in the instant case have standing to sue, the judgment of the district court should be reversed for the reasons stated in our brief in No. 98-404.

CONCLUSION

The judgment of the district court should be vacated, and the case should be remanded with instructions that the complaint be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be reversed for the reasons stated at pages 25-49 of the Commerce Department's brief in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, No. 98-404.

Respectfully submitted.

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APPENDIX

Article I, Section 2, Clause 3 of the United States Constitution provides as follows:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Section 2 of the Fourteenth Amendment to the United States Constitution provides as follows:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants

of such State, being twenty-one years of age,[1] and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 2a of Title 2, United States Code, provides as follows:

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of

[1] See Amendment XIX and section 1 of amendments XXVI.

Representatives to which such State is entitled under this section. In case of a vacancy in the office of clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Section 141 of Title 13, United States Code, provides as follows:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary a plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with

respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1) If–

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census–

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

Section 195 of Title 13, United States Code, provides as follows:

Use of sampling

Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

Section 209 of the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2480-2483 (1997), provides as follows:

(a) Congress finds that–

(1) it is the constitutional duty of the Congress to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States;

(2) the sole constitutional purpose of the decennial enumeration of the population is the apportionment of Representatives in Congress among the several States;

(3) section 2 of the 14th article of amendment to the Constitution clearly states that Representatives are to be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State";

(4) article I, section 2, clause 3 of the Constitution clearly requires an "actual Enumeration" of the population, and section 195 of title 13, United States Code, clearly provides "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.";

(5) the decennial enumeration of the population is one of the most critical constitutional functions our Federal Government performs;

(6) it is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States;

(7) the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census;

(8) the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted; and

(9) Congress is committed to providing the level of funding that is required to perform the entire range of constitutional census activities, with a particular emphasis on accurately enumerating all individuals who have historically been undercounted, and toward this end, Congress expects–

(A) aggressive and innovative promotion and outreach campaigns in hard-to-count communities;

(B) the hiring of enumerators from within those communities;

(C) continued cooperation with local government on address list development; and

(D) maximized census employment opportunities for individuals seeking to make the transition from welfare to work.

(b) Any person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law (other than this Act), in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of Members

in Congress, may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method.

(c) For purposes of this section–

(1) the use of any statistical method as part of a dress rehearsal or other simulation of a census in preparation for the use of such method, in a decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress shall be considered the use of such method in connection with that census; and

(2) the report ordered by title VIII of Public Law 105–18 and the Census 2000 Operational Plan shall be deemed to constitute final agency action regarding the use of statistical methods in the 2000 decennial census, thus making the question of their use in such census sufficiently concrete and final to now be reviewable in a judicial proceeding.

(d) For purposes of this section, an aggrieved person (described in subsection (b)) includes–

(1) any resident of a State whose congressional representation or district could be changed as a result of the use of a statistical method challenged in the civil action;

(2) any Representative or Senator in Congress; and

(3) either House of Congress,

(e)(1) Any action brought under this section shall be heard and determined by a district court of three judges in accordance with Section 2284 of title 28, United States Code. The chief judge of the United States court of appeals for each circuit shall, to the extent practicable and consistent

with the avoidance of unnecessary delay, consolidate, for all purposes, in one district court within that circuit, all actions pending in that circuit under this section. Any party to an action under this section shall be precluded from seeking any consolidation of that action other than is provided in this paragraph. In selecting the district court in which to consolidate such actions, the chief judge shall consider the convenience of the parties and witnesses and efficient conduct of such actions. Any final order or injunction of a United States district court that is issued pursuant to an action brought under this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under this section may be issued by a single Justice of the Supreme Court.

(2) It shall be the duty of a United States district court hearing an action brought under this section and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any such matter.

(f) Any agency or entity within the executive branch having authority with respect to the carrying out of a decennial census may in a civil action obtain a declaratory judgment respecting whether or not the use of a statistical method, in connection with such census, to determine the population for the purposes of the apportionment or redistricting of Members in Congress is forbidden by the Constitution and laws of the United States.

(g) The Speaker of the House of Representatives or the Speaker's designee or designees may commence or join in a civil action, for and on behalf of the House of

Representatives, under any applicable law, to prevent the use of any statistical method, in connection with the decennial census, to determine the population for purposes of the apportionment or redistricting of Members in Congress. It shall be the duty of the Office of the General Counsel of the House of Representatives to represent the House in such civil action, according to the directions of the Speaker. The Office of the General Counsel of the House of Representatives may employ the services of outside counsel and other experts for this purpose.

(h) For purposes of this section and section 210–

(1) the term "statistical method" means an activity related to the design, planning, testing, or implementation of the use of representative sampling, or any other statistical procedure, including statistical adjustment, to add or subtract counts to or from the enumeration of the population as a result of statistical inference; and

(2) the term "census" or "decennial census" means a decennial enumeration of the population.

(i) Nothing in this Act shall be construed to authorize the use of any statistical method, in connection with a decennial census, for the apportionment or redistricting of Members in Congress.

(j) Sufficient funds appropriated under this Act or under any other Act for purposes of the 2000 decennial census shall be used by the Bureau of the Census to plan, test, and become prepared to implement a 2000 decennial census, without using statistical methods, which shall result in the percentage of the total population actually enumerated being as close to 100 percent as possible. In both the 2000 decennial census, and any dress rehearsal or other simulation made in preparation for the 2000 decennial

census, the number of persons enumerated without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for: (1) all data releases before January 1, 2001; (2) the data contained in the 2000 decennial census Public Law 94-171 data file released for use in redistricting; (3) the Summary Tabulation File One (STF-1) for the 2000 decennial census; and (4) the official populations of the States transmitted from the Secretary of Commerce through the President to the Clerk of the House used to reapportion the districts of the House among the States as a result of the 2000 decennial census. Simultaneously with any other release or reporting of any of the information described in the preceding sentence through other means, such information shall be made available to the public on the Internet. These files of the Bureau of the Census shall be available concurrently to the release of the original files to the same recipients, on identical media, and at a comparable price. They shall contain the number of persons enumerated without using statistical methods and any additions or subtractions thereto. These files shall be based on data gathered and generated by the Bureau of the Census in its official capacity.

(k) This section shall apply in fiscal year 1998 and succeeding fiscal years.

(5)

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IN THE

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OCTOBER TERM, 1998

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Appellants,

v.

MATTHEW GLAVIN, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLEES RICHARD A. GEPHARDT, DANNY K. DAVIS, JUANITA MILLENDER-McDONALD, LUCILLE ROYBAL-ALLARD, LOUISE M. SLAUGHTER, and BENNIE G. THOMPSON SUPPORTING APPELLANTS

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13 U.S.C. § 195 ..... *passim*

U.S. Const., amend. XIV, § 2 7

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Representatives Richard A. Gephardt, Danny K. Davis, Juanita Millender-McDonald, Lucille Roybal-Allard, Louise M. Slaughter, and Bennie G. Thompson, intervenors in the

district court,[1] having already submitted an extensive merits brief in No. 98-404, *United States Department of Commerce v. United States House of Representatives*, submit this short additional brief to address the distinctive aspects of the Virginia district court's opinion in this case. As we show, this new opinion adds little to the failed arguments offered by the D.C. district court in support of the proposition that Congress has prohibited use of statistical techniques designed to enhance the accuracy of the decennial census.

STATEMENT

On September 24, 1998, the U.S. District Court for the Eastern District of Virginia joined the U.S. District Court for the District of Columbia in ruling that 13 U.S.C. § 195 bars the Census Bureau from using any form of "sampling" to adjust the results of the decennial census to make it more accurate -- at least to the extent that the results are then used for purposes of apportionment of seats in Congress among the states. The Virginia court's opinion, however, includes just a handful of pages discussing the merits. In that short section, the court pointed to no affirmative indication that Congress -- in enacting section 195 in 1957 or amending it in 1976 -- ever sought to prevent use of statistical methods to address the persistent problem of the undercount. Nor did the court attempt to square

[1]In the joint motion of appellants and appellees Glavin *et al.* seeking to consolidate this case with No. 98-404 and requesting an expedited briefing schedule, some question was raised about whether those groups who filed motions to intervene in the Virginia district court were ever granted party status. Any doubt on that score has now been allayed by an order entered on October 15, 1998, by the Virginia court clarifying the fact that it intended to grant the intervention motions on August 7 when it allowed counsel for the intervenors to appear and argue the case on the merits.

its ruling with the acknowledged fact that the Census Bureau has for decades used forms of statistical sampling in producing counts used for apportionment -- including "imputation" and the "postal vacancy check." *See* J.S. App. 3a-4a (describing use of imputation in the 1990 Census); *id.* at 3a (asserting, without explanation, that the "Bureau's plan to use sampling in the Postal Vacancy Check is not in dispute in this lawsuit").

Instead, the court purported to rely solely on the "plain language and structure of the Act." J.S. App. 21a. As we discuss here, however, the plain language of the statute simply does not point to the conclusion that sampling is barred for purposes of apportionment. That is why the D.C. district court went to great lengths to deploy various presumptions and supposed principles of statutory interpretation in an unpersuasive effort to justify rejection of the obvious harmonizing reading of the two relevant statutory provisions, 13 U.S.C. §§ 141(a) and 195. The Virginia court's solution -- to rely on flat assertions about "plain meaning" that lack any valid basis in the actual meaning of the words Congress used -- is even less persuasive.

SUMMARY OF ARGUMENT

The Virginia court's reading of the "plain language" of the statute was flawed in multiple ways. First, it suggested that section 141 would not, on its own, authorize use of sampling for purposes of apportionment. But there can be no doubt that section 141(a) is fairly read as authorizing such a use of sampling, as even the D.C. court acknowledged. Second, the Virginia court read the "except" clause of section 195 as a flat prohibition of use of sampling for apportionment purposes. But that is wrong as well. The court was obligated to try to harmonize sections 141(a) and 195, and that is easily

accomplished if the "except" clause of section 195 is read in accordance with what it says -- not as a prohibition but simply as an exception from the *mandated* use of sampling for *non*-apportionment purposes.

Such a reading is entirely fair. An exception to a mandate, like that contained in section 195, is not ordinarily understood to create a prohibition of anything. Indeed, this reality is illustrated by the two cases cited by the district court -- *Richardson v. Ramirez*, 418 U.S. 24 (1974), and *Crosby v. United States*, 506 U.S. 255 (1993) -- both of which involved "except" clauses that *themselves* prohibit nothing. Finally, the district court's reliance on the principle that a court should, where possible, read a statute so as to give each relevant provision some separate significance, was remarkable. It is the court's own proposed reading that renders the reference to sampling in section 141(a) utterly superfluous.

ARGUMENT

The reasoning offered by the Virginia district court to support its decision to enjoin the Census Bureau from using statistical sampling for apportionment purposes in the 2000 Census is even less persuasive than that contained in the earlier ruling of the D.C. district court. Like the D.C. court, the Virginia court held that section 195 of the Census Act, 13 U.S.C. § 195, precludes the Census Bureau from using sampling for that purpose and thus trumps the apparent authorization of sampling in the decennial census for all purposes contained in section 141(a) of the Act, 13 U.S.C. § 141(a). In so doing, the Virginia court, like the D.C. court, avoided the obvious possibility of applying both sections harmoniously -- *i.e.*, interpreting section 141(a) as authorizing sampling for all purposes and section 195 as requiring

sampling, wherever feasible, outside the apportionment context. But as explained in our earlier brief in No. 98-404, the law plainly requires a court to explore and adopt such a harmonizing reading, rather than assume that Congress (1) decided to create an exception to an ostensibly universally applicable provision and then (2) did so, not by including an exception in that section, but by enacting a separate section that makes no reference to the first. *See* Br. of Intervenors Gephardt *et al.* at 16-23, in No. 98-404.

The district court began its statutory analysis by suggesting that section 141(a), read by itself, does not authorize the use of sampling for apportionment. That section expressly authorizes the Secretary to use "sampling procedures" in the "decennial census of population" -- the primary (and sole constitutional) purpose of which is collection of population information for use in apportionment of seats in Congress among the states. But the district court, although acknowledging that "Section 141 of the Census Act generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition," J.S. App. at 18a, pointed to section 141(g), which defines a "census of population" as a "census of a population, housing, and matters related to population and housing." Based on this slim reed, the court drew the remarkable conclusion that "the plain language of Section 141 itself . . . establishes . . . Congress' intent . . . to authorize sampling for numerous purposes of the census *other than congressional apportionment*." *Id.* (emphasis added).

That reading is utterly indefensible. To the contrary, section 141(g) makes clear that the authorization of sampling in section 141(a) extends to the census of *population*, the very census routinely used for apportionment. Indeed, section 141(b) states that the tabulation of population used for

apportionment is to be based on the decennial census authorized by section 141(a). That is why even the D.C. district court concluded that section 141(a) "standing alone appears to permit statistical sampling in congressional apportionment." J.S. App. at 61a, in No. 98-404.

The Virginia court then went on to place greater reliance on the assertion that "[u]nder 13 U.S.C. § 195, Congress' prohibition against the use of sampling is clear on its face." J.S. App. 18a. It then asserted that section 195 is more "specific" and, relying on various decisions of this Court, concluded that this more specific provision must be read to trump the authorization of sampling for apportionment purposes in section 141(a). But for reasons already discussed in our prior brief, this analysis was severely flawed.

First, as the Virginia court itself recognized, the principle that a specific provision controls a more general provision takes effect *only* when the two provisions cannot be "reconciled." J.S. App. 20a; *see* Br. of Intervenors Gephardt *et al.* at 17-18, in No. 98-404 (citing cases). Second, it is hardly "clear on its face" that the "except" clause in section 195 constitutes a *prohibition* of anything. To the contrary, as the D.C. court acknowledged, an exception to a mandate does not always -- or even ordinarily -- create a prohibition. *See id.* at 20-22. There is thus no reason to avoid the obvious harmonizing reading of sections 141 and 195 as (1) authorizing use of sampling for apportionment purposes while (2) requiring such use, wherever feasible, for other purposes.

The district court offered only two arguments to support its rejection of that reading. First, it cited two cases involving provisions with "except" clauses. Neither, however, is remotely apposite because neither interprets an except/shall

sentence structure as itself creating a prohibition. Indeed, these cases provide further support for the proposition that when Congress uses the except/shall structure, it does not ordinarily -- if ever -- intend to create a prohibition. At most it intends to allow other sources of law to govern the area that it has exempted, and these other sources of law determine whether or not there is a prohibition. Here, the relevant other source of law is Section 141 which, rather than prohibiting the use of sampling for apportionment, expressly authorizes the Census Bureau to do so.

In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the first case cited by the district court, this Court considered an equal protection challenge to a state's disenfranchisement of a class of convicted criminals. In rejecting that challenge, the Court relied on Section 2 of the Fourteenth Amendment which imposes sanctions on states (a diminution of representation) if they disenfranchise their citizens but exempts from that sanction states that disenfranchise criminals or rebels:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State . . . . But when the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . .

U.S. Const., amend. XIV, § 2. The Court concluded that the Amendment would not have exempted states that disenfranchise criminals from its automatic sanction of diminished representation if another portion of the same Amendment -- the equal protection clause -- simultaneously

forbade states altogether from disenfranchising criminals. 418 U.S. at 55.

Contrary to the unexplained suggestion of the district court, nothing in *Richardson v. Ramirez* in any way supports that court's reading of section 195. The "except" clause in the Fourteenth Amendment is an exception from imposition on states of a penalty for abridging their citizens' right to vote. The Court never suggested that this clause itself creates any sort of mandate or prohibition. It may well be that the Fourteenth Amendment does prohibit Congress from reducing the representation of states that disenfranchise criminals, but this prohibition is created by the first sentence of Section 2, which provides that apportionment is to be based on states' respective numbers, not by the except clause in the second sentence. The except clause merely establishes that states which disenfranchise criminals are not subject to the automatic sanction of diminished representation and thus that apportionment for those states continues to be governed by the first sentence of Section 2. The analogous provision of the Census Act is Section 141, which, rather than prohibiting the Census Bureau from using sampling, explicitly allows it to do so.

Like the Fourteenth Amendment, the underlying statute at issue in *Crosby v. United States*, 506 U.S. 255 (1993), also cited by the district court, shows that when Congress exempts an area from a mandate, it does not ordinarily intend to create a prohibition. In *Crosby*, this Court was interpreting Rule 43(a) of the Federal Rules of Criminal Procedure, which requires that criminal defendants be present at trial, "except as otherwise provided." The Court concluded that the "except" clause was exclusive; it leaves no room for creation of exceptions not "otherwise provided." But the Court never intimated that the

"except" clause, where it applies, *prohibits* a defendant's presence at trial.

Nor could it have done so. For example, one of the exceptions "otherwise provided" is Rule 43(c)(2), which states that a defendant may choose not to attend a trial of a crime punishable by less than one year's imprisonment. But the defendant obviously retains the *option* to attend. Thus, the fact that this situation is excepted from the requirement in Rule 43(a) merely preserves discretion. Here, once again, an exception from a mandate is just that, and nothing more.

Finally, the district court relied on the principle that a statutory interpretation should, where possible, give effect to every statutory provision. J.S. App. 19a-20a. But that principle, in fact, strongly undercuts the court's preferred interpretation. The district court's argument was that defendants' reading of the statute "renders the 'except for' language [in section 195] devoid of meaning." J.S. App. 19a. But that is clearly incorrect. The "except" clause in section 195 exempts sampling for purposes of apportionment from the conditional *mandate* established in the rest of section 195. By exempting apportionment from this requirement, Congress left the Census Bureau discretion to refrain from using sampling for apportionment even if it is feasible.

Indeed, it is the district court's reading that violates the canon that a statute should, if possible, be construed so that every word has substantive effect. Under that reading, section 141(a)'s authorization of sampling is entirely superfluous, because section 195 controls the use of sampling both inside and outside the context of apportionment. Only under defendant's reading does section 141(a) have independent force

-- providing the Census Bureau with affirmative authorization to use sampling for apportionment purposes.

In sum, nothing in the Virginia district court's opinion in any way strengthens the arguments in favor of reading the Census Act as prohibiting use of sampling for apportionment purposes. For all of the reasons stated here and in our earlier brief, the Act is best read as allowing the Census Bureau to make that choice.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. § 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in the 2000 census in determining the population for the purpose of apportioning Representatives among the states.

2. Whether Article I, Section 2, Clause 3 of the Constitution prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the states.

PARTIES TO THE PROCEEDINGS

William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census, are appellants in this case and were defendants below;

Matthew Glavin; Robert Barr, individually and in his capacity as a member of the United States House of Representatives; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresanta; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn, individually and in his official capacity as Cobb County Commission Chairman; and Cobb County, Georgia are appellees in this case and was the plaintiff below;

National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California; and

Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M.

Slaughter; Bennie G. Thompson, individually and in their capacities as members of the United States House of Representatives; and

Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; and

City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Long Beach, California; City of San Jose, California; City of Stamford, Connecticut; City of Oakland, California; City of Cudahy, California; County of Santa Clara, California; County of San Bernardino, California; County Of Alameda, California; County of Riverside, California; State of New Mexico; City of Detroit, Michigan; City of Bell, California; City of Gardena, California; City of Huntington Park, California; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Guitierrez, John Conyers, Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez, Carlos Romero-Barcelo, individually and in their capacities as members of the United States House of Representatives; State of Texas;

are appellees in this case and were intervenor-defendants below.

RULE 29.6 LISTING

Organization of Chinese Americans, Inc. is the corporate parent of Organization of Chinese Americans, Los Angeles, California Chapter. Other appellee corporations associated in this action with National Korean Service & Education Consortium, Inc. have neither corporate parents nor subsidiaries required to be listed pursuant to Sup. Ct. R. 29.6.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, *et al.*,
Appellants,

v.

MATTHEW GLAVIN, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF FOR APPELLEES NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, INC., *et al.* IN SUPPORT OF APPELLANTS

OPINION BELOW

The opinion of the district court, *J.S.* 1a-23a, is not yet reported.[1]

JURISDICTION

The opinion and order of the district court, *J.S.* 1a-23a, were entered on September 24, 1998. Appellants filed their notice of appeal, *J.S.* 37a-39a, on September 25, 1998. The jurisdiction of this Court is invoked under the Departments of Commerce, Justice, and State, the Judiciary, and Related

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[1] References to the jurisdictional statement are cited as "*J.S.*"; references to the Joint Appendix in 98-404, *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, are cited as "*App.*, 98-404."

Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This Court noted probable jurisdiction on October 9, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at *J.S.*24a.

2. Amendment V of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment XIV, Section 2 of the United States Constitution is reproduced at *J.S.*24a-25a.

4. Sections 141 and 195 of Title 13, United States Code, are reproduced at *J.S.*27a-30a.

STATEMENT OF THE CASE

National Korean American Service & Education Consortium, Inc. and the other Asian American and Latino organizations and individuals submitting this brief seek to protect their interests in ensuring that the nation's racial and ethnic minorities are counted equally with non-hispanic whites in the 2000 census.[2] These parties respectfully refer the Court to their brief filed as appellees in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, 98-404, on October 6, 1998, for a more complete statement of the facts underlying this case, which are briefly set forth below.

In the last census, the Census Bureau missed more than four million people overall, a disproportionate majority of whom were racial and ethnic minorities.[3] Sixty-nine percent of these people the Census Bureau failed to count were members of racial and ethnic minorities, even though members of these groups represent only about 25 percent of

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[2] These Asian American and Latino organizations and individuals are National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California.

[3] U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age By Race and Hispanic Origin* (visited Oct. 1, 1998) <http://tier2.census.gov/pl94171/PL94data.htm>.

the total population.[4] Notwithstanding the fact that the 1990 census was the most expensive and most exhaustive effort in history to employ traditional census methods, it was the first census known to be less accurate overall than its predecessor.[5]

Recognizing that the next census would fall five million short of an accurate count if traditional methods were used exclusively, and that racial and ethnic minorities would again be omitted disproportionately from the census count, the Secretary of Commerce decided to use statistical sampling in conjunction with more traditional census techniques in 2000.[6] Plaintiffs, however, seek in this suit to prevent the implementation of this solution, which is the only practicable solution that addresses the disproportionate undercounting of minorities.

Because racial and ethnic minorities are likely to be missed using traditional census methodologies, areas in which many minorities live will be disproportionately undercounted as compared to the rest of the nation. The people who live in those areas -- many or most of whom are the minorities who are likely to be uncounted -- will disproportionately bear the brunt of the effects of the undercount, including the dilution of their votes due to malapportioned political districts, the misallocation of congressional representation, and a diminished access to federal funding.

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[4] *Id.*

[5] U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *Report to Congress — The Plan for Census 2000* (Aug. 1997), *App.*, 98-404 at 48.

[6] *Id., App.*, 98-404 at 99.

The injunction entered below will preserve the advantages of those communities that have been actually or relatively overcounted in the past at the expense of communities with substantial minority populations. Far from either adding "virtual persons" to the population count or subtracting persons who actually exist, as plaintiffs contended below, the proposed census methodology will scientifically account for those systematically missed and those double-counted pursuant to traditional survey methods, thereby producing a more accurate enumeration.

The lower court appears to have accepted as plain truth plaintiffs' inaccurate characterization of the workings of the census plan, even though defendants and intervenor-defendants disputed these purported "facts" in opposition to summary judgment. Defendants and intervenor-defendants explicitly disputed plaintiffs' erroneous assertion below that "[a]ctual persons counted will be deducted from the census population figures" if the proposed sampling methodology were used.[7] Intervenor-defendants also submitted evidence in opposition to summary judgment to show that the use of statistical sampling will lead to a more complete and accurate census than would traditional methods of enumeration.[8]

Furthermore, contrary to the district court's opinion, no community will suffer "vote dilution" if statistical sampling

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[7] *See* Defendants' Response to Plaintiffs' "Rule 10(f)(2)" Statement of Undisputed Material Facts, ¶ 29 (May 4, 1998); National Korean American Service & Education Consortium, Inc, *et al.*, Local Rule 56(b) Statement of Genuine Issues of Material Fact Submitted in Opposition to Plaintiffs' Motion for Summary Judgment, ¶ 29 (May 4, 1998).

[8] *See* Memorandum of Proposed Intervenor-Defendants National Korean American Service & Education Consortium, Inc., *et al.* in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. 1, ¶ 10 (May 4, 1998).

is used in conducting the decennial census in 2000. *See J.S.*11a-12a. Instead, the plaintiffs' voting districts, as well as all others drawn on the basis of accurate census data, will at last comport with the principle of "one person, one vote." As there are neither statutory nor constitutional impediments to the use of statistical sampling for a more accurate enumeration of the population for purposes of apportionment, the injunction below should be vacated.

The Legal Underpinnings of the Decennial Census

The Constitution provides that Representatives shall be "apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. 1, § 2, cl. 3. Originally, these "Numbers" were to be determined not by including all members of society in a numerical assessment, but rather, "by adding to the whole Number of free Persons, . . . excluding Indians not taxed, three fifths of all other Persons." *Id.* The Census Clause then provides that "[t]he actual Enumeration [of the states' respective Numbers] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as [the Congress] shall by Law direct." *Id.* The Fourteenth Amendment subsequently recognized the status of former slaves as equal "persons" under the Constitution, and requires that the "respective Numbers" of the states for the purpose of apportionment include "the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV.

Congress has delegated to the Secretary of Commerce the responsibility for taking each decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress has also provided that sampling must be used whenever feasible, "[e]xcept for the determination of

population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195. The statute does not say that sampling cannot be used for purposes of apportionment.

The Lawsuit and Proceedings Below

The plaintiffs filed suit to enjoin the use of the Census Bureau's plan to use statistical sampling in the 2000 census, asserting that the use of statistical sampling in determining the population for purposes of apportionment violates both the Census Act and Article I, Section 2, Clause 3 of the Constitution. The suit named William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census (collectively, the "government defendants") as defendants. National Korean American Service & Education Consortium, Inc. and the other individuals and organizations submitting this brief were one of four groups that intervened as defendants under Fed. R. Civ. P. 24.[9]

The government defendants and three intervenor-defendant groups moved to dismiss the complaint for lack of jurisdiction and failure to state a claim, and the plaintiffs moved for summary judgment. The district court denied the motions to dismiss, concluding that the case is ripe for judicial review, *J.S.*7a, and that the plaintiffs have standing, *J.S.*9a. The court also granted the motion for summary judgment, holding that the use of statistical sampling in

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[9] Although the issue of the party status of intervenors below appeared uncertain at the time the Jurisdictional Statement was filed, *see J.S.*II, the district court stated in an order dated October 15, 1998 that intervention had been granted at the time of oral argument below.

determining the population for purposes of apportionment would violate the Census Act. *J.S.*16a-17a.

Because it concluded that the Census Act prohibits the use of statistical sampling for purposes of apportionment, the district court found no need to reach the constitutional question presented. *J.S.*17a n.2, 21a.

SUMMARY OF THE ARGUMENT

1. The plain text of sections 141(a) and 195 together demonstrate Congress's intent to permit sampling for a number of purposes, including the purpose of apportionment of Representatives in Congress among the several states. In section 141(a), Congress provides that sampling procedures and special surveys are permissible ways in which to undertake a decennial census of population. Section 195 requires the Secretary to use sampling if he deems it feasible. The introductory clause of section 195, however, exempts sampling for apportionment purposes from the general requirement that sampling be used. Contrary to the holding of the court below, this exception from the mandatory language of the statute does not prohibit the Secretary from using sampling if he believes it appropriate to do so. The words of the statutory provisions speak for themselves, stating clearly that the Census Act allows the use of sampling in the apportionment process.

2. The Constitution does not prescribe a particular methodology by which to conduct the census for purposes of apportionment, but rather, indicates that the form of such census should not be given priority over its accuracy. The words of Article I alone explicitly give Congress the power to conduct the decennial enumeration of the population "in such Manner as they shall be Law direct." Moreover, both the language of Article I and the records of the Federal

Convention demonstrate that the Framers meant only to mandate that the numbers for apportionment be calculated decennially according to a formula that took into account the entire free population and three-fifths of the slave population. No evidence suggests that the Framers ever considered precisely what methodology should be used to determine the total population number to which that formula would be applied. Finally, the Census Clause of the Constitution must be interpreted in light of the subsequent ratification of the Fourteenth Amendment, requiring that former slaves be counted in the census equally with whites, and the constitutional goals of equal protection and equal representation. An interpretation of the Census Clause to require a methodology known to perpetuate a differential undercount of racial and ethnic minority populations would clearly be inconsistent with those constitutional principles.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF THE CENSUS ACT

National Korean American Service and Education Consortium, Inc. and the other parties submitting this brief respectfully refer the Court to their brief filed as appellees in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, 98-404, on October 6, 1998 for a full discussion of the Census Act's clear grant of discretion to the Secretary of Commerce to use sampling in the decennial census for purposes of apportionment. An analysis of the district court's opinion is set forth below.

A. The District Court Gave Incomplete Consideration to the Provisions of Section 141

The district court erred in its "plain" reading of the Census Act, as that reading was based on a conclusory and erroneous decision that "the only plausible interpretation of the plain language and structure of the Act is that section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes." *J.S.*21a. The district court's interpretation of these two sections flies in the face of the language and the structure of the Act.

The lower court interpreted section 141 to be a provision that "generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition," and then concluded that "[a] reading of the plain language of Section 141 itself further establishes that Congress's intent was to authorize sampling for numerous purposes of the census other than congressional apportionment." *J.S.*18a. In deciding that the "plain" reading of the Census Act prohibits sampling for the purpose of congressional apportionment, however, the court disregarded both sections 141(a) and 141(b), citing without explanation only to section 141(g). *J.S.*18a. Section 141(g) merely states: "As used in this section, 'census of the population' means a census of a population, housing, and matters relating to population and housing." *J.S.*18a.

Read together, sections 141(a),(b), and (g) manifest the clear intent of Congress to give the Secretary the discretion to use sampling for a number of purposes, including the purpose of congressional apportionment. Even standing alone, section 141(a) expressly provides the Secretary with such discretion. *United States House of Representatives* v. *United States Department of Commerce*, 11 F. Supp. 2d 76, 103 (D.D.C. 1998) (stating that "section 141(a) . . . standing

alone appears to permit statistical sampling in congressional apportionment).

Section 141(a) of the Census Act states:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures and special surveys.*

13 U.S.C. § 141(a) (emphasis added). On its face, this provision clearly authorizes the use of sampling for the "decennial census of population," including for the purpose of apportionment. Furthermore, section 141(a) of the Census Act is the sole provision authorizing the Secretary to conduct the constitutionally required decennial census for congressional apportionment entrusted to Congress under Article I, Section 2, Clause 3. *See Wisconsin* v. *City of New* York, 517 U.S. 1, 19 (citing section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary"). Thus, it is clear that the "decennial census of population" to be conducted pursuant to section 141(a) — which entails the use of sampling — is to be used for apportionment. *See* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5467 (stating "[i]t is for the purpose of apportioning Representatives that the United States Constitution establishes a decennial census of population").

In addition, the plain text of Section 141(b) reinforces section 141(a)'s clear grant of authority to the Secretary to use sampling in conducting the decennial census for a number

of purposes, including for congressional apportionment. Indeed, section 141(b), which the court below failed to consider in its analysis, explicitly refers to congressional apportionment.

Section 141(b) states:

> The tabulation of total population by States *under subsection (a) of this section as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

13 U.S.C. § 141(b) (emphasis added). Therefore, sections 141(a) and 141(b) clearly demonstrate that the statute authorizes the Secretary to use statistical sampling in conducting the decennial census for apportionment purposes.

The other subsections of section 141 further support this reading of the statute. Throughout section 141, a critical distinction is made between the "decennial" census — which is used for apportionment purposes — and the "mid-decade" census (which is not). Indeed, Congress carefully amended section 141 by inserting the terms "decennial" or "mid-decade" in order to indicate the difference between the two censuses and the different purposes for which they serve.[10]

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[10] The Senate Report clearly provides that the 1976 amendment to section 141 of the Census Act modified the subsections in order to differentiate between the "decennial" and "mid-decade" censuses. S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466 (amending section 141 "by rewording subsections (a), (b), and (c) and (continued...)

Significantly, Congress specifically added subsection (e)(2) of section 141 to prohibit the use of mid-decade census data for the apportionment of the House. 13 U.S.C. § 141(e)(2); *see also* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5467. No such limitation, however, was placed on the use of the *decennial* census data for the apportionment of the House. Moreover, section 141(g), on which the lower court relied without explanation, *J.S.* 18a, defines the term "census of population" generally as a "census of population, housing, and matters relating to population and housing." 13 U.S.C. § 141(g). This definition is consistent with section 141's broad grant of discretion to the Secretary to use sampling for a number of purposes, including the decennial census of population (used to apportion the House) and other matters relating to housing or population.

B. The Reasoning Underlying the District Court's Interpretation of Section 195 is Flawed

In addition to rendering an incomplete analysis of section 141, the lower court also incorrectly read section 195 of the Census Act to prohibit the use of sampling for purposes of apportionment. Section 195 states:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the

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[10] (...continued)
adding four new subsections. The new subsection (d) authorizes the mid-decade census of population") and at 5467 ("[o]ne clarification is made by inserting the word 'decennial' before the word 'census' in each instance where it appears in subsection (c). This amendment makes clear the intent of 141(c) to relate solely to decennial census tabulations for reapportionment or redistricting purposes.").

> several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195. Nothing in the language of this provision prohibits sampling for any purpose. Rather, this provision is intended to mandate its use, wherever feasible, in every context except apportionment. Only with respect to apportionment does the Secretary retain absolute discretion to use or not to use sampling.

Despite this more obvious reading of section 195 which would allow sampling for purposes of apportionment consistent with section 141, the lower court held that "[t]he 'except for' language [of section 195] . . . plainly imposes a restriction forbidding the sampling method in collecting numbers for apportionment." *J.S.*19a. The lower court referred to the opinions in *Richardson* v. *Ramirez*, 418 U.S. 24 (1974), and *Crosby* v. *United States*, 506 U.S. 255 (1993), in an attempt to find support for its conclusion that the words "except for" automatically operate as an affirmative prohibition of a particular action whenever they appear in a sentence that otherwise commands that action. *J.S.*19a. While both of the decisions dealt with "except" clauses, neither found that such clauses, in and of themselves, operated as express prohibitions.

In *Richardson*, this Court considered whether the state of California violated the Equal Protection Clause by disenfranchising convicted felons who completed the service of their sentences and paroles. 418 U.S. at 41-56. In considering the question, the Court briefly examined the

"except for" language in section 2 of the Fourteenth Amendment,[11] but did not address the separate issue of whether such language automatically acts as a restriction. 418 U.S. at 41-56. Despite the Court's silence on this issue, the lower court in the present case attempted to support its position by seizing on the language in *Richardson* that noted that disenfranchisement for conviction of a felony was a situation that "was expressly exempted" from section 2's penalty of reduced representation in the event a state disenfranchised a portion of its citizenry. *Id.* at 55. Apparently, the district court assumed that the Court arrived at such an interpretation by virtue of the "except for" clause in section 2. *J.S.*19a.

However, the mere fact that the "except for" language may create an exemption in the context of section 2 does not force the conclusion that such language necessarily operates as a restriction of any kind. In fact, the "except for" clause in section 2 of the Fourteenth Amendment effectively operates as a restriction only because the first sentence of the

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[11] Section 2 of the Fourteenth Amendment provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

section commands an action ("representation *shall* be based on 'respective numbers'") that is inconsistent to that which is commanded in the second sentence ("representation *shall not* be based on 'respective numbers' in certain situations"). U.S. CONST. amend. XIV, § 2. Those situations falling within the scope of the exception set forth in the second sentence are governed by the previously stated rule on representation contained in the first sentence, which happens to require an inconsistent action. In contrast, the Census Act contains no inconsistent command with respect to sampling for any and all purposes. Like section 2, situations falling within the scope of the exception set forth in section 195 of the Census Act are governed by a previously stated rule. Yet unlike section 2, the previous rule of the Census Act, namely, section 141(a), is *consistent* with the rule in section 195, and permits sampling for a number of purposes, including congressional apportionment. To be sure, neither exception, as stated in section 2 of the Fourteenth Amendment or in section 195 of the Census Act, by itself prescribes or prohibits any particular action.

The district court's reliance on *Crosby* v. *United States* to support its interpretation of the language of section 195 is similarly misplaced. In *Crosby*, this Court considered whether Federal Rule of Criminal Procedure 43 permits the trial *in absentia* of a criminal defendant who absconds and is absent at the beginning of trial. 506 U.S. at 256. That rule provides in pertinent part:

> (a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence, *except as otherwise provided by this rule*.

> (b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced . . . .

Fed. R. Crim. P. 43 (emphasis added). The Court held that Rule 43 prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial, but stated that a trial could proceed *in absentia* of a defendant who is voluntarily absent after the trial has commenced. *Crosby*, 506 U.S. at 258-61. The district court in the present case interpreted *Crosby* to mean that the "except as otherwise provided" language of the rule constitutes "an express limitation of the circumstances where a defendant could permissibly be absent." *J.S.* 19a. However, that language was not, and could not be, found to limit the instances when a defendant could permissibly be *present*. *Crosby*, 506 U.S. at 259-61. After a defendant has left voluntarily following the beginning of trial, his presence is not necessary to the completion of the proceedings, but it is nonetheless permissible for him to be present as the trial continues. *Id.* Thus, the mandate in Rule 43 is for a defendant's presence at trial, but the exception to that mandate does not prohibit the defendant's presence in the exceptional situation. Similarly, the mandate in section 195 is to use sampling, and the exception to that mandate does not prohibit the use of sampling in the exceptional situation.

C. The District Court Erred in Its Application of the Rules of Statutory Interpretation

In reaching its conclusion that "[s]ection 141 in no way undermines the definite prohibition of sampling for purposes of apportionment contained in Section 195," *J.S.*21a, the district court also erred in its application of the rules of statutory interpretation. While it properly recognized that "'[i]t is the cardinal principle of statutory construction . . . to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section,'" *J.S.*17a (citations omitted), the court violated this rule with a strained reading that ignores significant provisions of section 141. *See, e.g., Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947) ("Our task is to give all of it [the entire statute] . . . the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other."). Section 141 plainly permits the use of sampling in the decennial census for congressional apportionment.

The lower court incorrectly asserted that "[r]eading the general authorization for sampling in Section 141 as somehow negating the prohibition of sampling in Section 195 would render the language of Section 195 meaningless." *J.S.*20a. The purpose of Section 195 is to limit the Secretary's discretion in using sampling for purposes other than apportionment, while allowing complete discretion under the statute to use sampling for purposes of apportionment. The "except for" language that the lower court found would be rendered "devoid of meaning" by such a reading, *J.S.*19a, still has a very precise meaning: that the limits on the Secretary's discretion set forth in section 195 do not apply to apportionment.

The court's opinion is also somewhat contradictory in its subsequent application of the rule of statutory interpretation which provides that the more specific section governs the general when two sections conflict. *J.S.*20a. The lower court claimed that section 141 did not authorize sampling for apportionment. *J.S.*21a. Yet, the lower court's decision to choose section 195 as the more specific provision, *J.S.*20a, necessarily assumes that section 141 is contrary to the lower court's "plain" reading of section 195, and therefore that section 141 does indeed permit sampling for apportionment purposes.

Based on the plain language and the rules of statutory interpretation, the two provisions should be read together to permit the use of statistical sampling for a variety of purposes, including the purpose of congressional apportionment. The plain text of section 141 alone manifests Congress's intent to authorize the Secretary to use "sampling procedures and special surveys" in conducting the "decennial census of population," the census to be used for congressional apportionment. Section 195's plain language reasonably must be read also to allow the use of sampling in the decennial census for purposes of apportionment.

II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING IN ENUMERATING THE POPULATION FOR PURPOSES OF APPORTIONMENT

If the lower court erred in interpreting the Census Act to prohibit sampling, the question of whether the language of the Constitution precludes the use of statistical sampling in the 2000 census for purposes of apportionment must be considered.

The lower court stated that it was not considering the constitutional question presented by the plaintiffs, as it found the statutory question dispositive. *J.S.*17a n.2, *J.S.*21a. In dicta, however, the district court asserted without reasoning that "the plain language" of the Constitution in both Article I, section 2, clause 3 and the Fourteenth Amendment "mandates a head count of the population." *J.S.*17a n.2. National Korean American Service & Education Consortium and the other parties submitting this brief respectfully refer the Court to their brief filed as appellees in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, 98-404, on October 6, 1998 for a refutation of the district court's assertion and a full discussion of the constitutional issues in this case, which is summarized below.

Nothing in the Constitution prohibits the use of sampling for purposes of apportioning representatives. Neither the language nor the history of the Constitution offers any indication that the Framers intended either to require or to prohibit any particular procedure for determining the numbers of the entire population. The records of the Federal Convention, in fact, demonstrate that the words "actual Enumeration" in the Constitution mandated the act of calculating a total based on the formula set forth in Article I

that took into account the whole free population and three-fifths of the slave population, not a specific means by which to arrive at the total population number to which the formula would be applied.

With the ratification of the Fourteenth Amendment, the Constitution for the first time required that the former slaves be counted equally in the decennial "enumeration" for the purpose of apportioning representatives. Any reading of the words "actual Enumeration" that would require adherence to a methodology certain to result in less-than-equal counting, therefore, would undermine the fundamental principles of equality embodied in the Fourteenth Amendment.

Although various types of household surveys have historically been the mainstay of the decennial census, past history is not determinative of the limits of Congress's discretion as set forth in the Constitution, which directs Congress to take the census "in such Manner as they shall by Law direct." It does not preclude the use of newly developed methodologies that better account for the entire population. Furthermore, in light of the differential undercount of racial and ethnic minorities that will inevitably result if only traditional methods are used, considerations of equal representation and equal protection militate for the use of statistical sampling in the 2000 census.

CONCLUSION

The Court should reverse the district court and vacate the order enjoining the use of statistical sampling in the 2000 census for the purpose of apportioning Representatives among the states.

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October 20, 1998

Supreme Court, U.S.
FILED
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CLERK

No. 98-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, *et al.*,

Appellants,

v.

MATTHEW GLAVIN, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. §§ 1, *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

2. Whether the Secretary of Commerce's plan for the 2000 census violates either Article I, Section 2 of the Constitution, or Section 2 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW

1. APPELLANTS (defendants in the District Court):

   William S. Clinton, in his capacity as President of the United States; The United States Department of Commerce; William M. Daley in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census.

2. APPELLEES (plaintiffs in the District Court):

   Matthew Glavin; Robert Barr, individually and in his capacity as a member of the United States House of Representatives; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresantata; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn, individually and in his official capacity as Cobb County Commission Chairman; and Cobb County, Georgia. Plaintiffs twice moved to amend their complaint to add the following additional plaintiffs: Delaware County, Pennsylvania; DuPage County; Illinois; and Bucks County, Pennsylvania. It is not clear whether the district court granted the motions to amend.

3. APPELLEES (intervenor-defendants in the District Court):

City of Los Angeles, *et al.*: City of Los Angeles, CA; State of New Mexico; State of Texas; City of New York, NY; County of Los Angeles, CA; City of Chicago, IL; City and County of San Francisco, CA; County of Miami-Dade, FL; City of Inglewood, CA; City of Houston, TX; City of San Antonio, TX; City and County of Denver, CO; City of Long Beach, CA; City of San Jose, CA; City of Stamford, CT; City of Oakland, CA; City of Cudahy, CA; County of Santa Clara, CA; County of San Bernardino, CA; County of Alameda, CA; County of Riverside, CA; City of Detroit, MI; City of Bell, CA; City of Gardena, CA; City of Huntington Park, CA; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and the following Members of Congress, individually and in their official capacities as Members of the United States House of Representatives: Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis Gutierrez; John Conyers, Jr.; Jose Serrano; Cynthia McKinney; Charles Rangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee; Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez; Carlos Romero-Barcelo.[1]

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[1] The district court issued an Order on October 15, 1998 (see Appendix) clarifying that it had granted all motions to intervene on August 7, 1998, including that of the City of Los Angeles, *et al.* appellees. If, for any reason, the City of Los Angeles, *et al.* appellees are not considered parties to this action,

In compliance with Rule 29.6, none of the City of Los Angeles, *et al.* appellees are parent corporations, subsidiaries or affiliates of any entities that have outstanding securities in the hands of the public.

4. APPELLEES (intervenor-defendants in the District Court):

Richard A. Gephardt, *et al.*: Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson, individually and in their official capacities as Members of the United States House of Representatives.

5. APPELLEES (intervenor-defendants in the District Court):

Legislature of the State of California, *et al.*: Legislature of the State of California; the California Senate; John Charles Burton, individually and as President Pro Tempore of the California Senate; the California Assembly; and Antonio Villaraigosa, individually and as Speaker of the California Assembly.

6. APPELLEES (intervenor-defendants in the District Court):

National Korean American Service & Education Consortium, Inc., *et al.*: National Korean

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they hereby request that the Court accept this submission as an *amicus* brief.

American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-564

WILLIAM JEFFERSON CLINTON, *ET AL.*,
Appellants,

v.

MATTHEW GLAVIN, *ET AL.*,
Appellees.

On Appeal from the United States
District Court for the Eastern District of Virginia

BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

STATEMENT OF THE CASE

An inaccurate census is a boon to the plaintiff-appellees. For the last eight years, they have enjoyed the windfall produced by flawed 1990 census data: enhanced voting power and a more than fair share of federal funds. The plaintiff-appellees received this windfall because they reside in areas immune to the invidious problem of differential undercounting, namely, the predominately white, affluent, suburban regions of our country. And like all unjust enrichment, this windfall comes at the expense of others -- minorities, immigrants, children and the rural poor, the

people least able to afford vote dilution or the diminution of federal assistance.

Conversely, an accurate census will cause grave "injury" to the plaintiff-appellees, or so they contend. Because statistical sampling would reduce or eliminate differential undercounting, the plaintiff-appellees would no longer receive an inequitable share of federal funds or greater representational value for each vote cast. In other words, their "injury" flows from being deprived of their windfall, and they are unwilling to relinquish those advantages. Such an incredible claim stands the notions of justice and redressable injury on their heads, and should not be countenanced by this Court.

The Census Bureau's plan for conducting the 2000 census, which includes the use of statistical sampling in conjunction with traditional data collection techniques, will result in the most accurate and cost-effective census ever taken. *See The United States Department of Commerce, Bureau of Census, Report to Congress -- The Plan for Census 2000*, ix (revised and reissued August 1997). Reapportionment and redistricting based on census data adjusted using statistical sampling would more closely approach the constitutional objective of one-person, one-vote. And census data adjusted by statistical sampling also would facilitate a more even-handed distribution of federal funds to local government entities. Neither the Census Act nor the Constitution precludes the use of statistical sampling for the purpose of Congressional reapportionment, and Section 195 of the Census Act actually requires its use for all other purposes -- such as redistricting and allocation of

federal funds -- where, as here, the Secretary of Commerce deems it feasible.

The plaintiff-appellees essentially claim an entitlement to the advantages they have enjoyed in terms of political power and federal funding. They, like all Americans, however, are only entitled to equal representation and an equitable distribution of federal funds, both of which depend upon accurate census data.

SUMMARY OF ARGUMENT

This case has been consolidated for oral argument with the *United States Department of Commerce, et al. v. United States House of Representatives, et al.*, No. 98-404. On the merits, the legal issues raised by the two cases are virtually identical. These issues were addressed in the *Brief of Appellees City of Los Angeles, et al. in Support of Appellants*, filed in No. 98-404 on October 6, 1998, and need not be repeated here. The lone exception is plaintiff-appellees' contention below that the phrase "counting the whole number" in Section 2 of the Fourteenth Amendment requires census takers to engage in a "head count," and prohibits the use of statistical sampling. That contention is nonsense. The quoted passage refers to a rule of apportionment, not a mode of gathering census data.

ARGUMENT

Section 2 of The Fourteenth Amendment Does Not Prohibit The Use of Statistical Sampling For The Purpose of Apportionment

In the district court, the plaintiff-appellees argued that the phrase "counting the whole number of persons" in Section 2 of the Fourteenth Amendment constitutes a "constitutional mandate that population be determined by means of an actual head count." *Plaintiffs' Reply Brief in Support of their Motion for Summary Judgment* at 27. The district court did not reach this -- or any other -- constitutional issue. And, in any event, plaintiff-appellees' argument has no support in either the text or the drafting history of the Fourteenth Amendment.

Ratification of the Thirteenth Amendment abolished the ignominious "three-fifths rule" embodied in article I, Section 2 of the Constitution:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons*.

U.S. Const., art. I, § 2, cl. 3 (emphasis added).

Because they were no longer slaves, the freedmen moved from the category "all other Persons" to the "whole Number of free Persons." However, because the Thirteenth Amendment had not guaranteed freedmen the vote, the ironic

result was to increase the political power of white Southerners. *See* William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, 40-43 (1998).

The purpose of Section 2 of the Fourteenth Amendment was to adjust the rule of apportionment. The first part of Section 2 reflects the emancipation of the slaves, and the elimination of the three-fifths rule, by providing that:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

U.S. Const., amend. XIV, § 2.

And, as reflected in the balance of Section 2, the framers of the Fourteenth Amendment selected a rule of apportionment that would reduce Southern representation in Congress to the extent the freedmen were systematically denied the right to vote:

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id.

The phrase "counting the whole number of persons" simply means that every inhabitant (with the exception of "Indians not taxed"), including the former slaves, shall be counted as a whole person -- not three-fifths of a person -- for the purpose of apportionment.

Plaintiffs' contention that the phrase demonstrates that the framers of the Fourteenth Amendment were exclusively committed to conducting the census through the use of a "head count" is wholly unsupported by the records of the debates of the first session of the Thirty-Ninth Congress that drafted and debated the Fourteenth Amendment. As was also true with the debates among the framers of the Census Clause in 1787, these debates were concerned solely with the substantive rule of apportionment, not the mode of gathering census data.

CONCLUSION

For all the reasons stated above, the Court should reverse.

Respectfully submitted,

Dated: October 20, 1998

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MATTHEW GLAVIN, et al.,
Plaintiffs,

Civil Action No. 98-207-A

v.

WILLIAM J. CLINTON, et al.,
Defendants.

ORDER

This motion comes before the Court on the Intervenors' motions to clarify the Order for the motions to intervene. It appears to the Court that the motions to intervene were granted at the time of the hearing on August 7, 1998, and all intervenors were given the opportunity to be heard. Whereas the Intervenors have moved for further clarification, it is hereby

ORDERED that all Interveners motions to intervene are GRANTED.

Judges Widener and Jackson concur.

/s/
CHIEF JUDGE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
October 15, 1998

(12)

No. 98-564

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October Term, 1998

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

MATTHEW J. GLAVIN, ET AL.,

Appellees.

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STATEMENT OF THE CASE

One would scarcely conclude from appellants' brief that for the first time in the Nation's history, the government will deliberately omit tens of millions of persons from its actual count of the population; that, according to the government itself, its statistical methodology will be less accurate than the traditional enumeration and is justified only by a desire to save money; and that a traditional enumeration would count over 98 percent of the population. Perhaps because of the unprecedented and illegitimate nature of this undertaking, the government has candidly acknowledged its preference to shield its plan for the 2000 Census from "lawyers and judges."[1] Appellants maintain that no one has standing to challenge this plan prior to its implementation because it is impossible to foretell who will be injured under the plan. Given that there will be no more information relating to the winners and losers *even after* the plan has been implemented, as the Department of Commerce (the "Department") does not intend to conduct a traditional enumeration against which the results of the plan can be compared, appellants are in truth seeking to erect a permanent barrier against judicial review of their effort to conduct the census.

Under this plan, appellants will conduct only a partial enumeration, and then "statistical[ly] estimate" the remainder of the population in two ways. JA I 170-71.[2] First, the Department will conduct nonresponse follow-up ("NRFU") sampling. JA I 170. Appellants estimate that approximately

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[1] Statement of Director Riche, *Hearing Before the House Subcommittee on National Security*, 104th Cong., 1st Sess. 80 (Oct. 25, 1995).

[2] The Brief of the United States, Joint Appendix, and Jurisdictional Statement Appendix in *Department of Commerce v. House of Representatives*, No. 98-404, will be referred to as "Br. I," "JA I," and "*House* JS App.," respectively. The Brief of the United States and Joint Appendix in this case will be referred to as "Br. II" and "JA II," respectively.

33% of the people who receive census questionnaires, primarily through the mail, will not respond. JA I 88. In the past, the Department attempted to find every person that has not responded to the mail-out through an intense process of nonresponse follow-up. JA I 49-50. This essential component of the headcount will be abandoned under the Department's plan for the 2000 census.

The Department will instead select at random only the number of households that need to be counted in order to enumerate 90% of the addressees in a census tract to whom questionnaires were mailed. JA I 88, 170, 363. Thus, in a census tract where 70 percent of addressees return their forms by mail, the Department will randomly select 2 out of every 3 nonresponding households for follow-up. JA I 91. Given that the Department has consistently maintained that 90% of the population will be physically counted under its plan, the Department's plan is necessarily predicated on the fact that each person who is selected for nonresponse follow-up will ultimately be physically identified and counted.[3] After the 90% enumeration has been reached in each tract, the Department will then add to its actual population count an estimate of the number of people in the 10% of households that were not selected for nonresponse follow-up. JA I 92. Thus, the Department intends to add approximately 26 or 27 million people from 12 million households to the results of the traditional headcount. JA I 100. None of these persons will have been physically counted. The Department will simply estimate the number and demographic composition of these unknown persons by imputing to them the population and demographic characteristics of the nearest *nonresponding*

[3] *See, e.g.*, JA I 170 ("The rate at which the sample is selected *will ensure* that at least 90 percent of the housing units in the tract have completed census forms.") (emphasis added); JA I 71 ("The nonresponse follow-up operation in Census 2000 will incorporate the use of sampling to yield a 90 percent completion rate at the census tract level."); JA I 88 ("The Bureau's plan for this operation includes a limited use of statistical sampling to assure that data are collected from at least 90 percent of the housing units in each census tract.").

households in the tract. *Id.* The appellants have never publicly identified any professionally accepted standard supporting this assumption.

It is undisputed that sampling for nonresponse follow-up *decreases accuracy*: "Technically, the *most accurate* design alternative, according to the results of the [Census] *Bureau's* research, would be to attempt 100-percent follow-up of nonrespondents and use ICM [integrated coverage management] to address accuracy problems." General Accounting Office, GAO/GGD-97-142, *Progress Made on Design, but Risks Remain* 26 (July 1997) (emphasis added). By the Department's own reckoning, a complete traditional enumeration and a subsequent ICM adjustment would have an error rate of only .8% at the tract level, which increases to a 1.1% error rate because of the 10% estimate. *Id.* at 79. Appellants do not claim otherwise. They intend to sample the inhabitants of nonresponding households, instead of counting them, solely in order to save time and money, not because it even arguably increases accuracy. JA I 55, 88-89, 99-101. This NRFU sampling thus has nothing to do with correcting any "undercount" or "differential undercount" of the traditional enumeration. Rather, the appellants have deliberately *created* a 10% undercount and then filled the gap by estimating, rather than counting, the people in these identified and occupied households.

Once this initial estimate of the known population has been calculated, the Department will again statistically adjust this population through the use of a process known as "integrated coverage management" ("ICM"). JA I 92-98. ICM is a procedure for statistical estimates generally referred to as dual system estimation ("DSE"), the same methodology utilized in the Post-Enumeration Survey ("PES") conducted after the 1990 census. JA I 94, 98. *See Wisconsin v. City of New York*, 517 U.S. 1, 8-9 (1996). Under the Department's plan, the initial estimate of the population will be followed by a sample survey covering all of the housing units in 25,000 different census blocks. After comparing the differences between the information collected in the initial data collection phase and that collected for the ICM, the Department will assign each person in the ICM sample to a unique "post

stratum, or group of people who" the Department believes have "similar chances (probability) of being counted in the initial data collection operation." JA I 95. "The post strata are defined by a state geographic sub-division (such as rural or urban), owner or renter, age, sex, race, and Hispanic origin." JA I 95-96.

On the basis of the ICM sample, appellants will estimate the number of persons in each post stratum who were correctly counted and will use that estimate to create an adjustment factor for each post stratum. JS 4a-5a. The "adjustment factors" will be applied to each block in the entire country and those adjusted totals will be the reported population number used for congressional apportionment and other purposes. JA I 96-98.[4]

The Department's plan closely mirrors its effort to statistically adjust the results of the actual physical count of the population in the 1990 census. JA I 94, 96, 98. The Department ultimately decided not to make such an adjustment because of the highly questionable assumptions upon which both the PES and the Department's plan were based and the attendant unreliability of the results of this methodology. Indeed, the Department was forced to dramatically revise its initial estimated undercount projection of 2.1 percent to 1.6 percent or approximately ***1 million*** "people." U.S. Dep't of Commerce, Bureau of the Census, *Report of the Committee on Adjustment of Postcensus Estimates* 15 (Aug. 7, 1992).

Appellees are sixteen individuals whose votes will be diluted by the Department's failure to conduct a lawful census in a timely manner and its plan to statistically estimate the population, as well as three counties that will lose federal funding as a result of the Department's plan. JA II 8-13. Appellees filed suit in the Eastern District of Virginia under

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[4] It is expected that the adjustment factor for some post strata will be less than one. Thus, the adjustment based on such post strata may well produce a population figure for a county or city less than the population derived prior to adjustment. Indeed, under 1992 PES adjustment factors, at least 28 large counties would have had their final count reduced *below the number of persons physically counted by the census*. JA II 125-31.

the 1998 Appropriations Act, JS 31a-36a, and challenged the legality and constitutionality of the Department's plan. The three-judge court unanimously held that appellees had standing under Article III because "[t]here are several distinct, concrete injuries that the [appellees] will imminently suffer if the Department's plan is implemented." JS 9a. The court went on to enjoin the plan because it violated Section 195's clear prohibition against using statistical sampling for congressional apportionment. JS 21a.

SUMMARY OF ARGUMENT

1. To place the standing inquiry in its proper perspective, it is important to understand that appellees' injury is fairly traceable to *two* distinct, final decisions made by federal appellants. First, appellants decided not to create, or calculate, the population number derived from the actual enumeration that appellees maintain is legally and constitutionally required, *i.e.*, the number reflecting a counting of 100% of the known population. Rather, they will enumerate only 90% of the known population. Wholly without regard to whether the population number yielded by 100% actual enumeration would produce a "better" relative population for appellees than that provided under appellants' sampling plan, this unconstitutional inaction injures appellees now by making it impossible even to *know*, let alone use, the only lawful census number for apportionment in 2001 or for redistricting in 2002, absent immediate relief. This inaction particularly injures the Georgia appellees because it is *undisputed* that using the lawful census number in 2000 would increase that state's congressional representation beyond that which currently exists. Equally important, the decision not to produce the actual enumeration number forever renders the Department's plan nonjusticiable under the standing barrier appellants seek to erect, since it will not be possible *after* the census is completed for anyone to prove with certainty that they would have had greater congressional representation under the nonexistent actual enumeration number than they were given under appellants' sampling population number.

Second, appellants made a final decision to use a statistical estimate, instead of an actual enumeration, to determine the population for apportionment, redistricting, and federal funding. This plainly injures appellees because it is both substantially likely and undisputed that their share of population for intrastate voting and federal aid will be relatively smaller than if the census population were based on the actual enumeration number. While federal appellants have arguably produced a genuine factual dispute over whether this diminution in relative population is sufficiently severe to lead to the loss of a congressional seat in appellees' states, they do not so dispute that the relative population of appellees' counties will be markedly smaller under the census sampling plan than under an actual enumeration. These injuries are fairly traceable to appellants' plan and will be redressed by the relief sought.

2. On the merits, appellants' plan to statistically estimate the population violates the specific language of 13 U.S.C. § 195, which authorizes sampling "[e]xcept for" purposes of congressional apportionment. Appellants counter that Congress in 1976 implicitly repealed the 200-year-old prohibition on sampling for congressional apportionment by commanding the Secretary to sample for all nonapportionment purposes and simultaneously conferring unfettered discretion to use sampling for congressional apportionment. This novel interpretation of the Census Act was consistently rejected by appellants themselves when the statute was amended. More importantly, there is no indication, in either the plain language of the statute or the legislative history, let alone clear and manifest evidence, that Congress intended to repeal the prohibition against sampling and to authorize the Secretary to use statistical estimates for apportionment purposes, even when estimates are less accurate.

3. Article I, Section 2 of the Constitution requires that representation be apportioned on the basis of an "actual Enumeration." Since the time of the Founding, this clause has been interpreted to require a physical count of the population. Although the parties disagree as to whether the prospect of increased accuracy would be a *sufficient* condition for a

"major departure" from a traditional enumeration, JA I 263, all agree that increased accuracy is a *necessary* condition for any such deviation from a headcount. Nevertheless, it is undisputed that the Department's plan to deliberately omit 10% of the population, or approximately 27 million persons, from its physical count is *less accurate* than a traditional enumeration would be and therefore would be unconstitutional under *any* proposed standard.

The Department's plan is also flatly inconsistent with the plain language of the Constitution. At the time of the Framing, the term "actual Enumeration" was uniformly understood to require census officials to *count* the population. The Department's plan to statistically estimate the population is invalid because it is not a count. It thus fails to conform with this simple but clear requirement, which was intended to furnish a "permanent and precise standard" for determining the population for apportionment purposes.

ARGUMENT

I. THIS CASE IS JUSTICIABLE NOW.

To satisfy the requirements of Article III, appellees must demonstrate "an injury 'fairly traceable to the [appellants'] allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Appellees challenge both what the appellants have decided not to do – conduct a full headcount of the known population by 2001 – as well as what appellants have decided to do – use a statistically estimated population, instead of an actual enumeration of population, to apportion Congress. Appellants' decision to enumerate only 90%, rather than 100%, of the known population and their distinct decision to statistically estimate the census population currently impose injuries on appellees. JA I 170-71. Article III, therefore, does not affirmatively divest this Court of the power to adjudicate

this important controversy in the timely manner that both political branches desire.[5]

1. For the 2000 census, the Secretary has decided not to conduct an actual enumeration of the sort that appellees maintain is required by the Census Act and the Constitution; that is, an actual headcount of all the known population. Rather, the appellants will enumerate, or count, only the population residing in *90%* of the known households. It will then statistically estimate the population of the remaining 10% of known households (NRFU Sampling) and create an additional number on top of this representing appellants' statistical estimate of the unknown population (ICM Sampling). *See* pp. 2-4, *supra*. Thus, there will not be any 100% enumeration in the year 2000.

This "one number" census is in stark contrast to the 1990 census, where the Secretary produced population results for both the number derived from statistical adjustment and the number produced by the actual enumeration. Appellants' failure to produce both numbers for 2000 means that, absent a contrary decision by this Court, the legally and constitutionally required actual enumeration number will simply not be available for congressional apportionment in 2001. Nor does anyone contend that such a number could be produced in time for the 2002 elections, given the enormous lead time, effort and money needed to produce an actual enumeration for the Nation. JA I 173, 180; JA II 60-61. Accordingly, if, as must be assumed for standing purposes, the actual enumeration number is legally and constitutionally required for congressional apportionment, this mandatory system will not be in place absent judicial intervention now. *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). While appellants" decision to use statistical estimates for apportionment might be remediable in 2001 if appellants had decided to also produce an actual

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[5] It is undisputed that the 1998 Appropriations Act, signed into law by Appellant Clinton, "eliminates any prudential standing limitations" and thus this case must be decided unless Article III affirmatively prevents the Court from doing so. *Raines v. Byrd*, 117 S. Ct. 2312, 2318 n.3 (1997) (citing *Bennett v. Spear*, 117 S. Ct. 1154, 1162-63 (1997)).

enumeration number, as was done in 1990, their failure to do so means that judicial vindication of appellees' legal rights will be impossible any time after approximately March of 1999.[6] Appellees' injury is thus imminent.

Indeed, for standing purposes, appellants' decision not to calculate the actual enumeration of the population is legally indistinguishable from a decision by the federal government not to conduct the census *at all* or to conduct a census for only, say, 50% of the population. Under appellants' theory, no one would have standing to challenge these facially unconstitutional inactions until 2001, when Congress is statutorily and constitutionally required to apportion representatives. But because plaintiffs' injury would stem from defendants' failure to undertake a required action, their injury would be no different in 2001 than today. Moreover, plaintiffs in such cases would be in no better position in 2001 to make the standing showing that appellants contend is constitutionally required – a comparison of congressional representation under a 100% actual enumeration to congressional representation as it would exist without a new census or under the 50% census. Since no 100% actual enumeration would exist because of defendants' inaction, neither the plaintiffs nor the Court in 2001 would have any better information to determine with precise mathematical certainty whether the nonexistent 100% enumeration would increase plaintiffs' political power relative to the *status quo* of the 1990 census or to the 50% 2000 census. Accordingly, any assertion that plaintiffs may establish standing to challenge a failure to conduct a full census only by showing that they would be better off under a full census than under no census or a partial census is effectively an assertion that the failure to conduct a full census is never justiciable. But presumably even appellants would not

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[6] *Oversight of the 2000 Census: Putting the Dress Rehearsals in Perspective: Hearing Before the Subcomm. on the Census*, 105th Cong. 84 (Mar. 26, 1998) (statement of James Holmes, Director of the Census) ("I must caution that by this time next year [*i.e.*, March 1999] the train for Census 2000 has to be on one track.").

assert that the failure to conduct any census (or a 50% census) is forever immune from judicial scrutiny.

– Precisely the same is true here. The Court will not have any better basis in 2001 to compare the congressional apportionment yielded by a 100% enumeration to that yielded by appellants' sampling plan since the actual enumeration will not have been done, even for comparative purposes. Appellants' decision to conduct a 90% enumeration is different only in degree from a decision to conduct a 50% enumeration or no enumeration at all.[7]

To be sure, appellees' standing here is conceptually somewhat different than in most cases because here, unlike most cases, plaintiffs' injury stems from government's failure to perform an affirmative duty that benefits plaintiffs, rather than from a governmental decision to affirmatively burden plaintiffs. In such rare affirmative duty cases, the only potentially relevant inquiry is whether plaintiffs are in a worse position in the absence of the mandatory action than they would be if the defendants had performed the required action. At most, then, plaintiffs challenging a failure to conduct any census (or half a census) would be required to show that their vote had been diluted because they would enjoy greater congressional representation if the government fulfilled its constitutional duty to conduct the 2000 census than if the government did not. Notably, it is *undisputed* that appellees have made precisely such a showing here. Supported by appellees' uncontested affidavits, the court below found that it is "virtually certain" that the congressional delegation in Georgia, where Appellees Glavin and Byrne reside, would increase from 11 to 12 in 2000 under any census methodology

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[7] This injury is in no way "cured" by appellants' plan to "statistical[ly] estimate," rather than enumerate, the remaining 10% of the population. JA I 170-71. Appellees assert that this 10% statistical estimate is unlawful and a contrary determination cannot be made unless the Court *reaches* the merits.

– a finding appellants have not challenged in any way either below or in this Court. JS 12a; JA II 74, 9, 11.[8]

Thus, the Georgia appellees will not have this additional congressional representation precisely and only because of appellants' failure to conduct the mandated 100% enumeration in time for either appellants or a court to implement apportionment within the constitutionally required 10-year time frame. This injury therefore is fairly – indeed, directly – traceable to appellees' unconstitutional inaction.[9] In short, just as plaintiffs could challenge now a decision to violate the Constitution's directive that "[t]he actual Enumeration shall be made . . . *every* . . . *ten Years*," if the government decided not to conduct any census, so too can appellees challenge the government's decision here not to conduct a full "actual Enumeration." U.S. Const. art. I, § 2 (emphasis added).

Appellants nevertheless insist that the only relevant benchmark for establishing standing is a comparison of congressional representation under the Department's sampling plan with the congressional representation that would exist under the actual enumeration that appellants have decided not to create. Again, this assertion simply fails to recognize that appellees challenge two final decisions by appellants, each of which has a discrete harm: appellees challenge both what appellants have decided to do – use a statistically estimated population for apportionment – and what they have decided *not* to do – conduct an actual enumeration of the population for apportionment. The latter, unconstitutional inaction injures appellees by depriving them of the means to have the

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[8] A similar injury will be visited upon appellees residing in Forsythe County, Georgia and Loudon County, Virginia, whose populations, it is undisputed, have grown faster than the rest of their states since 1990. *See* JS 12a; JA II 75, 9-10.

[9] Moreover, although in the voting context individual plaintiffs have standing even if their concrete injury is "widely shared," appellees here have established a "particularized and differentiated harm" because the injury to Georgia residents will be different than that of states which would not gain additional members of Congress in 2000. *FEC v. Akins*, 118 S. Ct. 1777, 1779 (1998); *id.* at 1791 (Scalia, J., dissenting).

increased congressional representation they plainly would enjoy if the appellants abided by the Constitution and Census Act. This inaction injures appellees by failing to take affirmative steps to alter the *status quo* – a *status quo* that will become unconstitutional and illegal in 2001, but will not be remediable at that late date.

Indeed, appellants' failure here is directly analogous to a state legislature's failure to redraw malapportioned legislative and congressional districts following the decennial census. In such cases, courts have routinely found that plaintiffs have standing to challenge such legislative inaction on vote dilution grounds because the government's *failure* to act condemns plaintiff to the *status quo* of grossly malapportioned districts that could be corrected through timely action.[10] Here, appellants' inaction similarly dilutes appellees' voting strength by condemning them to the *status quo* – a *status quo* that will be unconstitutional in 2001 both because congressional districts will be grossly malapportioned and because appellees will have less congressional representation than they would enjoy if appellants performed their constitutional duty of conducting an actual enumeration. The only difference is that redistricting can be done in a matter of weeks or months, while all agree that an actual enumeration for the Nation will take at least 18 months. *See* n.6, *supra*. Thus, appellees' injury is imminent now but will be irremediable at any point after 1999, at the latest.

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[10] *See Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ([J]udicial relief is appropriate "when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion . . . . "); *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Ely v. Klahr*, 403 U.S. 108, 109-10 (1971). Such inaction becomes justiciable at the point at which the legislature cannot take affirmative action to redistrict in time for the next election cycle. Just as here, the injury in those cases is not dependent on any "hypothetical [future] lawsuit" to enjoin elections premised on the unconstitutional failure to redistrict, but, rather, on the current injury caused by the government's failure to perform its constitutionally mandated duty in the time frame required by the Constitution. Br. II at 34.

Appellants seek to evade this stark reality by making the almost comical assertion that Georgia's vote dilution can be cured by a court in 2001 because, *even absent an actual enumeration*, a court would still likely grant Georgia the "additional seat" they are "virtually certain" to gain. Br. II at 34. But, of course, a federal court cannot simply bestow an extra congressional seat on Georgia without knowing what state the seat *came from* and it cannot make that decision without knowing what all states are entitled to under an actual enumeration population number – the very number that will not be available. On the simplest level, for example, while Georgia is certain to gain at least one seat, it might well be entitled to two additional members of Congress. Moreover, many other states, of course, will gain or lose congressional representation under the new census. Reshuffling these various congressional seats cannot occur absent an enumeration number, which appellants have deliberately decided not to provide. Thus, a court in 2001 would be limited to enjoining the unconstitutional action of statistically estimating the apportionment population, but cannot timely *cure* this violation by putting in place the actual enumeration number which it will not have, and which no one claims can be developed in time for the 2002 elections. The only remedial alternative, then, would be using the 1990 apportionment, which even appellants seem to admit is unacceptable and which will clearly dilute the Georgia appellees' vote. Br. II at 34-35.

2. Appellees have also demonstrated, and the court below found, that they will suffer "several distinct, concrete injuries" as a direct consequence of what appellants have decided to do – use a statistical estimate, rather than an actual enumeration, to determine the census population. JS 9a.

Appellants' initial defense is that appellees must do more than allege in their complaint that they will have a smaller percentage of the population under appellants' sampling plan than under a traditional enumeration. Rather, relying solely upon *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), they argue that appellees must show that there is no genuine factual dispute about such reduced population since appellees moved for summary judgment. In the first place,

Defenders of Wildlife does not govern here since it addressed a plaintiff's burden "[i]n *response* to [a] summary judgment motion." 504 U.S. at 561 (emphasis added). More importantly, under the *Defenders of Wildlife* standard, to establish standing, a plaintiff need only "set forth by affidavit or other evidence specific facts, which for purposes of a summary judgment motion *will be taken to be true*." 504 U.S. at 561 (citations omitted) (emphasis added). Here, appellees have amply satisfied this standard as they have submitted affidavits setting forth specific facts which, if true, establish they will lose voting power and federal aid under the Department's plan.[11]

Similarly, in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), a case with a procedural posture identical to the instant case, all Justices accepted the allegations contained in plaintiffs' affidavits as true for standing purposes even though the government set forth "specific facts" vigorously disputing these claims of injury. 118 S. Ct. at 2099; *id.* at 2112-13 (Scalia, J., dissenting); Joint Appendix of *Clinton v. City of New York*, No. 97-1374 at 35-40. This Court did not, as appellants' rule would require, remand for a trial on the genuine issues of material fact that were disputed relating to standing, but decided the merits in favor of plaintiffs.

In any event, even if appellees' summary judgment motion on the merits required them to establish entitlement to summary judgment on standing, appellees have satisfied this heightened standard, for there is simply no dispute that the counties in which the individual appellees reside and the county appellees will lose relative population, and thus voting power and federal funds, respectively, under the Department's

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[11] Appellees have also satisfied this standard with respect to their claim of interstate vote dilution. Specifically, Dr. Weber's affidavit demonstrates that the State of Indiana, where appellee Hofmeister resides and votes, is virtually certain to lose a congressional seat solely as a consequence of the Department's methodology. JA II 65, 67. *See Franklin v. Massachusetts*, 505 U.S. 788 (1992). Moreover, contrary to appellants' suggestions, Dr. Weber's methodology did in fact utilize the most recent *projections* available at the time of his analysis.

plan. In stark contrast to appellants' vigorous dispute of the impact of their plan on the State of Indiana's congressional representation, appellants have not even alleged that it is remotely plausible or conceivable that Bergen County, Cumberland County, or Delaware County will have as much relative population under the plan as under an actual enumeration. Nowhere in appellants' briefs in this Court or the lower court, and nowhere in the affidavits they submitted, have they even attempted to introduce " 'specific facts,' " much less " 'significant probative evidence,' " casting doubt on appellees' specific factual showing that these counties will have less relative population under appellants' plan. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)). Rather, appellants have merely raised "metaphysical doubt," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), with various observations about how the future effect of the 2000 census plan is inherently unknowable. But there is no good faith basis for disputing that these counties are " '*likely*' " to "be credited with a smaller percentage of the population than those regions would receive if sampling were not utilized." Br. II at 29, 27 (emphasis added) (quoting *Defenders of Wildlife*, 504 U.S. at 561). In light of appellants' failure to set forth "specific facts" contesting appellees' injuries, there is simply no basis for finding an absence of injury under *any* factual standard. *See* Fed. R. Civ. P. 56(e).[12]

a. The court below found that the Department's plan would dilute the intrastate votes of several appellees because they "reside in counties whose relative population will be diminished by operation of the Department's plan." JS 11a. In fact, under the Department's 1990 Post-Enumeration statistical adjustment, Bergen County, New Jersey, where Appellee McLaughlin resides and votes, and Cumberland County,

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[12] *See Clinton v. City of New York*, 118 S. Ct. at 2101 (quoting *Bryant v. Yellen*, 447 U.S. 352, 368 (1980) (same)).

Pennsylvania, where Appellee Gons resides and votes, both had their population under the statistical adjustment *reduced* below the number of people that were *actually* counted because it was purportedly "more statistically accurate" to conclude that the enumerated people actually did not exist. JA II 128, 129. But for this statistical "adjustment," appellees' counties would have had a larger *absolute* population. When the population of other neighboring counties is being *increased*, this injury is severely compounded because it reduces these counties' *relative* share of population. Having demonstrated with substantial certainty that Bergen County and Cumberland County will suffer a loss of relative population under the Department's plan, based on the 1990 statistical adjustments, appellees have more than carried their burden of showing that it is " 'likely' " that the Department's plan will visit an injury upon Appellees McLaughlin and Gons. *Clinton v. City of New York*, 118 S. Ct. at 2101 (quoting *Bryant v. Yellen*, 447 U.S. 352, 368 (1980)).

Appellants' only response is that the results of the 2000 statistical adjustment are inherently unknowable, notwithstanding the results from the 1990 adjustment, because of the "substantial differences" between the design of their current plan and that of the 1990 PES. Br. II at 14. But appellants cannot and do not contend that these allegedly "substantial differences" (or intervening demographic changes in the counties) make it remotely conceivable that Bergen or Cumberland counties will have the same relative population under the sampling plan as under an enumeration.[13]

Appellants cannot contend that the 2000 census "undercount" and "adjustment" will be materially different than the 1990 "undercount" and "adjustment" because their entire adjustment effort is solely premised on their *own* finding that the 1990 DSE adjustment program is a very reliable predictor

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[13] Indeed, the Fifth Congressional District of New Jersey in which Bergen County is located will be the sixth hardest hit district in the entire country under the Department's plan in terms of its relative loss of voting strength. *See* AFSCME Br. at A-13.

of the results that will occur under the 2000 DSE adjustment program. Specifically, in support of their assertion that their sampling plan will be "more accurate" than a traditional enumeration, the Department made an administrative finding that a traditional enumeration in 2000 will have an "undercount" rate of 1.9% at *every* level of census geography, down to the tract level. JA I 122. This predicted error rate is based *solely* upon the results of the Department's *1990* PES statistical adjustment program, extrapolated forward to 2000. JA I 122-23.[14] Thus, in identifying the expected undercount rate of an enumeration in 2000 that needs to be "corrected," the Department's sole lodestar is the undercount revealed by the 1990 DSE program and it has concluded that the same undercount rate will persist in 2000 down to the tract level, notwithstanding any alleged improvements in increasing the response rate. This finding is essential to the Department's conclusion that their statistical adjustment plan is "more accurate," since it will have an error rate of "only" 1.1% at the tract level, compared to the unadjusted error rate of 1.9%. JA I 122. If the undercount rate of the 1990 DSE "adjustment" program is sufficiently predictive of what will occur in 2000 for appellants to determine the error rate of an unadjusted enumeration down to the tract level, then it is necessarily sufficiently predictive to determine which counties will gain or lose when this error rate is *adjusted*. This is particularly true of counties at the extreme, such as Bergen and Cumberland.[15]

Indeed, prior to this litigation, appellants were not coy about the demonstrable purpose and effect of their statistical

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[14] The error rate would merely have been 1.6%, *i.e.*, the 1990 adjustment rate, except that the Department applied the 1990 adjustment factors to the projected growth in traditionally undercounted demographic groups. JA I 122-23. *See* JA I 48 n.2.

[15] Alternatively, if it is "merely speculative" that the 1990 undercount experience will be repeated in 2000, then appellants have no basis for concluding that their statistical adjustment plan will improve accuracy since they have no idea whether the enumeration "error rate" will be 1.9% or 0.5% or any other number. JA I 122.

sampling program. Rather, the Department's operational plan expressly predicts that "[t]he totals for historically undercounted areas will be much better than those obtained from using traditional methods." JA I 160. Simple arithmetic demonstrates that increasing the representation of these areas necessarily decreases the relative representation of other areas from what they would have enjoyed under the traditional enumeration.[16] Of course, the *non-federal* appellants and their *amici* have no doubt as to who the winners and losers will be under the Department's plan.

This Court has repeatedly held that parties who have been subject to an adverse governmental decision have standing to challenge a future application of a similar decision-making process that gave rise to the past injury. For example, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court considered the standing of nursing home patients who had been subject to a prior illegitimate decision that would have required them to be transferred, which a new entity sought to revive. The Court held that these plaintiffs had standing to challenge the new transfer rules because "in light of similar determinations already made . . . the threat is quite realistic" that the plaintiffs would suffer future injury. 457 U.S. at 1001. Here, the predictive force of the prior "similar determination" is even stronger than in *Blum* because it is the *same* governmental actor, *i.e.*, the Department, whereas in *Blum* the prior

[16] The differences in methodology to which appellants cite relate merely to improvements in the process for increasing the response rate to the initial mailout and have nothing to do with measuring the undercount and adjusting for it. JA I 73-80, 98. Indeed, appellants are "confident" in the DSE methodology for adjusting the 2000 undercount *because* of their 1990 experience and there is no suggestion that the larger, in-state data base for 2000 will change the areas affected by the undercount. JA I 98. The "improvements" are expected to have little overall impact on even the *response* rate since it is expected to be 67% in 2000, as compared to 65% in 1990. JA I 52, 78. Indeed, it will have no discernible effect on the *undercount* rate, which appellants say will be *larger* in 2000 because the undercounted groups will increase in relative size.

determination had been made by a different decision maker. In *Bennett v. Spear*, 117 S. Ct. 1154 (1997), if a new formula had been put in place that resulted in the plaintiffs receiving less water and the government subsequently *readopted* this same formula, the injury requirement of Article III would have been satisfied as the threat of the farmers receiving less water would be both "likely," *City of New York*, 118 S. Ct. at 2101, and "realistic." *Blum*, 457 U.S. at 1001.[17]

Since appellants cannot challenge the factual sufficiency of appellees' intrastate vote dilution showing, they argue that a diminution in a county's share of a state's voting power is never a cognizable injury because, paraphrasing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), they note that "legislators represent people, not counties." Br. II at 28. *Reynolds* did, indeed, note this truism in concluding that the desire to preserve political subdivision lines cannot *justify* unconstitutionally gross population inequalities in legislative districts, but it simultaneously acknowledged that individual voters' political power was tied directly to the political subdivisions where they resided. The Court repeatedly acknowledged that it was a "clearly rational state policy [to] accord some legislative representation to political subdivisions" because voters in such political subdivisions share a community of interest and therefore it enhances those voters' power to have a representative who advocates those common interests. *See id.* at 1391 ("[L]ocal governmental entities are frequently charged with

[17] Appellees' showing of injury is far stronger than that of other plaintiffs who the Court has found to have standing. For example, in *City of New York*, the Snake River plaintiffs merely contended that they were considering "the possibility" of availing themselves of the vetoed tax benefit and that in the absence of the veto they might have "be[en] able to purchase" a processing facility. 118 S. Ct. at 2112 (Scalia, J., dissenting); *id.* at 2100. Thus, the Snake River plaintiffs' showing of injury was dependent upon their making a final decision to attempt to purchase a processing plant, obtaining financing for such a purchase, locating a willing buyer, and closing on this future, hypothetical purchase.

various responsibilities incident to the operation of state government.").[18] It is for this reason that, as the Court has repeatedly noted, preserving county and other political subdivision lines is a principal redistricting criterion.[19] Thus, to the extent that the population of appellants' counties is reduced relative to others, their political subdivision will form a smaller percentage of the relevant congressional or legislative district and this will reduce their ability to have their representatives advance their unified interests in the legislature.[20] It simply cannot be seriously maintained that adding 250,000 people to New York City would not increase that city's political power relative to the rest of the state and neighboring counties. JA II 123. The same is true, albeit on a somewhat smaller scale, of increasing appellees' counties' relative political population. After all, the primary evil addressed by *Baker v. Carr*, 369 U.S. 186 (1962) and its progeny was that voters of sparsely populated rural counties exercised disproportionate power over their representatives than urban voters. Appellees' injury is simply the flip side of the same coin.

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[18] *See Davis v. Bandemer*, 478 U.S. 109, 167 (1986) ("The concept of representation necessarily applies to groups: groups of voters elect representatives, individual voters do not . . . . ") (Powell, J., concurring in part and dissenting in part). *Franklin*, 505 U.S. at 820 (Stevens, J., concurring) ("[C]rucial representational rights depend on the *census* and apportionment.") (emphasis added).

[19] *See, e.g., Abrams v. Johnson*, 117 S. Ct. 1925, 1949 (1997) (Breyer, J., dissenting); *Bush v. Vera*, 116 S. Ct. 1941, 1953 (1996); *Mahan v. Howell*, 410 U.S. 315, 325 (1973). *See also* N.J. Const., art. IV, § 2, para. 3 ("[N]o county or municipality shall be divided among Assembly districts . . . . ").

[20] *See also Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980), *rev'd on other grounds*, 653 F.2d 732 (1981), *cert. denied*, 455 U.S. 999 (1982); *Ripon Soc'y, Inc. v. National Republican Party*, 525 F.2d 567-71 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); *City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48 (E.D.N.Y. 1989), *vacated on other grounds*, 34 F.3d 1114 (2d Cir. 1994), *rev'd sub nom., Wisconsin v. City of New York*, 517 U.S. 1 (1996).

Indeed, appellants' entire census plan is premised on the notion that granting certain groups and areas a smaller relative share of the population than they are entitled to "denie[s] [them] an equal voice in their government" and that the " 'differential undercount' . . . raises the possibility of malapportionment." JA I 49; Mem. in Supp. of Defs.' Mot. to Dismiss at 6. If it is true that decreasing the relative population of appellants' preferred groups injures them by diminishing the voting and political power of areas in which they reside, the same is necessarily true of appellees' counties.[21]

Finally, as noted, since the appellants will not ever produce a 100% enumeration, it will not be possible *after* the census is completed to make the factual showing contemplated by appellants, *i.e.*, comparing population levels under the traditional enumeration in 2000 to the results yielded by appellants' plan. In essence, a decision that this case is nonjusticiable would be a holding that the Department's plan will never be subject to judicial review.

b. Appellees have also demonstrated that Appellees Delaware County, Pennsylvania, and DuPage County, Illinois will lose federal funds as a result of the Department's plan.[22] JA II 71-72. Again, the *undisputed* facts establish that, at a minimum, Delaware County would receive more federal funds but for appellants' sampling plan.

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[21] Indeed, under appellants' theory of standing, an effort to *deliberately* diminish the population numbers for areas with high percentages of certain racial or ethnic minorities is nonjusticiable since it visits no tangible injuries on those groups. After all, "individuals" in the undercounted groups can still vote and they may well be placed in a congressional district whose representation is enhanced by virtue of the deliberate undercounting. *See* Br. II at 28.

[22] Appellees filed an unopposed motion for leave to file an amended complaint to add both Delaware County and DuPage County as plaintiffs on May 1, 1998 and the court below plainly treated Delaware County as a party and extensively discussed the injuries suffered by the county. JS 11a-12a. Br. II at II n.1. To remove any conceivable ambiguity, appellees filed a motion to clarify that Delaware County was a plaintiff, and the district court on October 19 granted the motion. App. 1a.

Most directly, it is conceded that Delaware County receives approximately $500,000 under the Social Services Block Grant program ("SSBG"), 42 U.S.C. § 1397, and that the distribution of such funds is based *exclusively* on relative population shares under the most recent decennial census. JA II 80-81. These SSBG funds are distributed to the states, which in turn allocate the money to counties and other local recipients. Under the 1990 PES, Pennsylvania, where Delaware County is located, had the *second lowest adjustment factor* in the Nation and thus was the hardest hit state under the Department's proposed methodology after Rhode Island. JA II 115. Again, appellants have not alleged, much less produced significant probative evidence suggesting, that it is remotely plausible that Pennsylvania will receive as much relative population, and therefore as many SSBG funds, under the Department's plan as it would under the traditional enumeration. Rather, appellants note only that the "SSBG program does not require that a State distribute funds within the State on the basis of population." Br. II at 29. But it does not matter how Pennsylvania ultimately distributes the funds, the only relevant point is that Pennsylvania will have *less* funds to distribute and thus Delaware County's *pro rata* share of that smaller pie will correspondingly decrease under any funding formula. At an absolute minimum, the dual diminution in Pennsylvania and Delaware County's[23] relative population places them at a severe "competitive disadvantage" in securing the limited SSBG funds, which is all that is required when the plaintiff is seeking an economic benefit which the illegal action makes more difficult to obtain.[24]

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[23] The 1990 PES *subtracted* over 2,500 people who had been physically counted in Delaware County to arrive at the final adjusted population numbers for the county. JA II 129.

[24] *Bryant v. Yellen*, 447 U.S. at 367-68; *City of New York*, 118 S. Ct. at 2100 & n.22; *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993). Specifically, in *Bryant*, the Court found that farmers "who had hoped to purchase [ ] excess lands" had standing to challenge the failure to interpret a statute to effectively require the sale of that excess land because it was presumed that this interpretation made it less likely they could purchase the land at a lower price. 447 U.S. at 366. For essentially the same reason, appellee counties' diminished relative population injures them by placing them at a competitive disadvantage for funds under the numerous federal programs that concededly use relative population as *one* of the selection criteria. Br. II at 28-29.

3. Appellants also maintain that appellees lack standing because their injuries are not "fairly traceable" to the Department's plan and cannot be redressed by this Court. Br. II at 29-30. Unsupported by citation to any precedent, appellants maintain that appellees' funding and dilution injuries are not "fairly traceable" to the reduced census population produced by appellants' violation of the Constitution and Census Act, because neither of these two laws requires the *federal* government to distribute *funds* on the basis of census numbers and because no federal law requires *states* to *redistrict* congressional and legislative seats on the basis of census numbers. Br. II at 29, 31. For the third consecutive Term, then, the Solicitor General argues that an injury is "fairly traceable" to a legal violation – and redressable – only if the violation is the *sole and proximate* cause of the injury. *See Bennett*, 117 S. Ct. at 1164; *City of New York*, 118 S. Ct. at 2099. The Court has unanimously rejected this argument in the past two Terms and should plainly do so again. *Bennett*, 117 S. Ct. at 1165; *City of New York*, 118 S. Ct. at 2099; *id.* at 2115 (Scalia, J., dissenting). Specifically, the Court should again affirm that the relevant question is not whether federal and state governments are *required* by the *challenged* laws to base funding and redistricting on the census numbers, but only whether they *do* make funding and redistricting decisions on this basis. Here, they do so because they are required to do so by *other*, previously existing laws and because, as a practical matter, states are "coerced" to do so since the census population is the only practical basis for redistricting. In short, an injury is "fairly traceable" to a violation if the injury would not occur but for the violation.

In *Bennett*, as here, the government argued that plaintiffs' reduced water supply was neither fairly traceable to the government's action or redressable because the Bureau of

Reclamation was not required to accept the conclusion of the Fish and Wildlife Service's Biological Opinion to reduce the irrigation water. In rejecting the government's view, the Court stated:

> [The government's theory] wrongly equates injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation. While, as we have said, it does not suffice if the injury complained of is the result of the *independent* action of some third party not before the Court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else.

117 S. Ct. at 1164 (citations omitted) (emphasis in original). Although the Bureau was "technically free" to reject the Wildlife Service's detrimental recommendation, the Bureau had a strong incentive to accept it and it "alter[ed] the legal regime" governing the Bureau's decision. 117 S. Ct. at 1165, 1168. Likewise, just last Term, the Court in *City of New York* rejected the government's argument that the economic injury suffered by the New York hospitals was not caused by the challenged line item veto because it was *state*, not federal, law that passed the costs of the veto onto the plaintiff hospitals. Even though New York State was not "required" to pass these additional costs onto the hospital plaintiffs, the Court found that plaintiffs' injury "[did] not turn on the independent actions of third parties, as existing [state] law [] automatically require[d] that [plaintiffs] reimburse the State." 118 S. Ct. at 2099.

Here, although New Jersey and other states are not required by *federal* law to use census population numbers for state legislative redistricting, appellees' *states'* laws do require use of these numbers.[25] Moreover, of course, states

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[25] *See, e.g.*, N.J. Const. art. IV, § 2, para. 1 ("The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States . . . . "); *Hapeville v. Anderson*, 272 S.E.2d 713, 714 (Ga. 1980); Pa. Const. art. 2, § 17; JA I 128 n.5. Moreover, it seems that all states must use census numbers for

are as a practical matter "coerc[ed]" to use federal census numbers because the only alternative is for each state to conduct its own census. This is an enormously time-consuming and expensive task and would cause "the Federal Government and the states [to] rely on different census results," with the resulting confusion that would necessarily entail. *Franklin*, 505 U.S. at 814 (Stevens, J., concurring). Even more obviously, it is irrelevant that the "*Constitution* . . . does not require . . . that federal financial assistance to States or localities must be distributed on the basis of population" since *federal funding laws*, like the SSBG, do require it. Br. II at 31 (emphasis added).

Appellants' redressability argument is without merit for essentially the same reason. For the first time in this Court, the Solicitor General speculates that if the Secretary is prohibited from implementing his current plan to use one set of sampling census numbers for all purposes, because those numbers violate statutory and constitutional requirements for congressional apportionment, the Secretary might alter his plan and produce two sets of census numbers. He might use the traditional enumeration number only for congressional apportionment *among* the states and might use the statistical adjustment numbers for redistricting and funding *within* each state. Br. II at 30. But the diminution in appellees' relative population caused by appellants' plan to base all census numbers on statistical sampling would, by definition, definitely be redressed by an order prohibiting the Secretary from proceeding with that sampling plan. To establish standing, the plaintiff need not go further and speculate about what the Secretary will do when his current program is declared unlawful. As the Court recently emphasized, the fact that the Department "might later, in the exercise of its lawful discretion, reach the same result for a different reason . . . does not destroy Article III 'causation' [because injured

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congressional redistricting. *Karcher v. Daggett*, 462 U.S. 725, 738 (1983) ("[B]ecause the census count represents the best population data available, it is the only basis for good-faith attempts to achieve population equality.") (citations omitted).

plaintiffs] have standing to complain that the agency based its decision upon an improper legal ground." *Akins*, 118 S. Ct. at 1786. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943). This is a much simpler case because it is not asserted that the Secretary might make the *same* decision – a one-number sampling census – after an adverse result, but only that he might embark on an entirely *different* two-number census, part of which is based on sampling.[26]

II. THE CENSUS ACT PROHIBITS USING STATISTICAL SAMPLING TO DETERMINE THE POPULATION FOR CONGRESSIONAL APPORTIONMENT.

Two provisions of the Census Act reference the use of statistical sampling in the decennial census. Consequently, these provisions necessarily overlap and must be reconciled. Section 141(a) requires the Secretary to "take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys." JS 27a. Standing alone, this provision would authorize the Secretary to sample for all purposes encompassed by the "decennial census of population," including determining the population number to be used for congressional apportionment. Section 195 of the Census Act, however, plainly delimits this open-ended delegation on proper

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[26] We nevertheless note that it is not remotely "feasible" that a *nonpartisan* Secretary would continue with a sampling census, *in addition to* an actual enumeration, after this Court has required an actual enumeration for congressional apportionment. Br. II at 32. For example, after the Court informs the Secretary he must count *100%* of the population, including the 10% of the households the Secretary now plans to statistically estimate, no rational Secretary would nonetheless go ahead and statistically estimate the population of the 10% of known households that have just been actually enumerated. More generally, there is no reason to presume a rational Secretary would violate the heretofore unquestioned principle that " '[t]here can be, for the population at *all* geographic levels at any one point in time, only one set of official government population figures.' " *Franklin*, 505 U.S. at 815 (Stevens, J., concurring) (quoting 55 Fed. Reg. 9,840-41 (1990) (emphasis added)).

census methodology with respect to sampling. Specifically, Section 195 states that, "*Except for the determination of population for purposes of apportionment of Representatives in Congress* . . . , the Secretary shall, *if he considers it feasible*, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." JS 30a (emphasis added).

These partially redundant provisions in the Census Act obviously must be read *in pari materia*, particularly since Section 195 prescribes the "[u]se of sampling" for all "provisions of this title" and preceded Section 141's reference to "sampling." JS 30a. The only reasonable way to harmoniously reconcile these provisions is to conclude that the Secretary may use sampling for all census purposes "[e]xcept for the determination of population for purposes of apportionment." This construction gives both Sections 141 and 195 meaning and logically resolves the interplay between the two provisions. The Secretary retains his broad general discretion to determine the proper methodology for conducting the census, including sampling, save for the particularized constraint contained in the specific statutory provision governing "[u]se of sampling" for all statutory purposes. It preserves Congress' differential treatment of apportionment sampling and other sampling and does not bestow on the Secretary authority Congress expressly intended to withhold, *i.e.*, using statistical sampling to derive the population number for congressional apportionment.

The federal appellants, however, interpret the two provisions as bestowing on the Secretary completely unfettered discretion to use sampling for apportionment purposes whenever he desires to do so, even when sampling is less accurate than traditional enumeration. Thus, the Secretary would have virtually unreviewable authority to sample "*even for*" purposes of congressional apportionment. This, of course, is precisely the authority the Secretary would enjoy if Section 195 were not in the statute at all. Thus, the appellants'

interpretation commits the cardinal sin of statutory construction by rendering Section 195 a nullity with no meaningful effect on the Secretary's authority.[27]

The federal appellants nevertheless suggest that giving Section 195's congressional apportionment exception its intended effect would also somehow commit the same sin by destroying the "internal consistency of the Act as a whole." Br. I at 31. But this is demonstrably untrue and contradicted by appellants' own arguments. Section 195, the specific statutory provision governing the "[u]se of sampling" for all "provisions of this title," simply is a particularized limitation on the Secretary's general discretion to conduct the census in the manner he deems fit. It is a typical feature of administrative statutes that broad general grants of authority are accompanied by specific limitations governing particular aspects of that programmatic responsibility.[28] In such instances, the limitation divests the agency of authority to engage in the specified conduct because "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Thus, the Department's broad authority to conduct the census must yield to the specific prohibition against sampling to determine the population for purposes of congressional apportionment.

Surely if the "except for" language were located in Section 141 *itself*, preceding the broad grant of authority to the Secretary, it would obviously prevent him from sampling for purposes of congressional apportionment. There is no coherent reason, consistent with the accepted principle that the statute must be read as a coherent whole, why a different

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[27] *See, e.g., Bennett*, 117 S. Ct. at 1166; *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 100 (1992).

[28] *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 365-66 (1986); *United States v. Giordano*, 416 U.S. 505, 512-14 (1974); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932).

result should obtain here simply because the "except for" language is in Section 195, rather than 141.[29]

This is particularly true because it is undisputed and indeed, indisputable, that Section 195 *does* control and limit the general discretionary grants of authority in Section 141 concerning sampling. The appellants argue that the purportedly "mandatory directive" to use sampling for *non-apportionment* purposes in the *second* half of Section 195 completely overrides Section 141's grant of discretionary authority to use sampling whenever the Secretary wants to do so. While, under Section 141 alone, the Secretary decides whether to use sampling for non-apportionment purposes, the use of the word "shall" in the second half of Section 195 overrides this discretionary authority and *requires* the Secretary to use sampling for non-apportionment purposes. *See* Br. I at 28-30.

Thus, all agree that Section 195's specific directive on sampling governs the Secretary's general Section 141 authority on sampling and that the Census Act as a whole draws a clear distinction between apportionment sampling and non-apportionment sampling. Just as Section 195 limits the Secretary's discretion concerning the circumstances in which non-apportionment sampling may be used, so too does it limit his discretion concerning the proper purposes for which sampling may be used, by excepting congressional apportionment from those authorized purposes. Since it is clear and undisputed that the second half of Section 195 governs Section 141's general grant of authority, there is no consistent or rational reason that the "except for" language in the same provision should not also be read into Section 141 to delimit that general grant of authority. This is particularly true since it is a venerable principle of statutory construction that a specific provision controls a general one.[30]

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[29] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981); *Richards v. United States*, 369 U.S. 1, 11 (1962).

[30] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524 (1989); *HCSC-*

Thus, there is simply no basis for the federal appellants' contention that interpreting the express language of Section 195 to limit Section 141's general delegation renders the statute internally inconsistent or violates any other principle of statutory construction. The federal appellants' arguments would therefore be untenable even absent consideration of prior versions of the Census Act. Consideration of that statute's evolution, however, further reinforces that the 1976 amendments to the Act did not grant the Secretary the unprecedented and momentous authority to determine apportionment of congressional representatives pursuant to "sampling procedure and special surveys." All agree that, prior to the 1976 amendments, the Census Act plainly held that the Secretary *may* sample for non-apportionment purposes but *may not* sample for apportionment purposes – precisely the statutory construction adopted by the courts below. Br. I at 32. If this prohibition was to be repealed, therefore, it is well established that "[t]he intention of the legislature to repeal 'must be clear and manifest.' " *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *United States v. Sweet*, 245 U.S. 563, 571 (1918).[31] Moreover, "[t]his long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions." *St. Marten Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981) (citing *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979)).

Federal appellants argue that the 1976 amendments did clearly constitute a change in the Secretary's authority, which

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Laundry v. United States, 450 U.S. 1, 6 (1981); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957).

[31] This "cardinal rule [ ] that repeals by implication are not favored" applies with equal force where the subsequent version of the same statute amends a prior provision of the statute at issue. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *St. Marten Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 788 (1981); *Sampayo v. Bank of Nova Scotia*, 313 U.S. 270 (1941); *Wood v. United States*, 41 U.S. 342, 363-65 (1842) (Story, J.).

reversed *both* aspects of his authority on sampling. Rather than being *authorized* to do non-apportionment sampling and *prohibited* from apportionment sampling, the 1976 amendments *required* the Secretary to use non-apportionment sampling and *authorized* him to do apportionment sampling. This dramatic, simultaneous contraction and expansion of the Secretary's authority, however, was accomplished in a very odd and extraordinarily oblique manner. Congress did not delete the "except for" limitation from Section 195 nor otherwise modify the Census Act to state that the Secretary's pre-existing discretion to use sampling had now been extended to the constitutionally-mandated and politically sensitive area of congressional apportionment. *But see Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994). This "clear" directive to engage in the momentous change was in no way even hinted at in any hearing or legislative history relating to the 1976 amendments and was affirmatively *denied* by federal appellants themselves many years thereafter.[32] *Cf. Chisom v.*

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[32] Vincent Barraba, the Director of the Census Bureau for the Carter Administration, stated in a 1980 report on the subject of sampling: "[I]n *Section 195* of Title 13, the Congress *expressly prohibited* the use of sampling in the apportionment process." 45 Fed. Reg. 69,366, 69,372 (Oct. 20, 1980) (emphasis added). Likewise, the Department of Justice has repeatedly stated in submissions to other courts "that the Census Act precludes the utilization of statistical adjustment for the purpose of apportioning representatives . . . [and] that 13 U.S.C. § *195* prohibits the use of adjustment for this purpose." *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980) (emphasis added). Thus, prior to 1990, it was uniformly contended that Section 195 *prohibited* sampling for purposes of congressional apportionment. *See, e.g., Orr v. Baldridge*, Cause No. 1F 81-604-C (S.D. Ind. 1985). Since 1990, some government lawyers have argued that Section 195's prohibition might not foreclose an *upward* adjustment of a *100%* headcount to *improve* accuracy. Memorandum of Stuart Gerson, Ass't Atty. Gen. at 1 (July 18, 1991); Statement of Sec'y Mosbacher, 56 Fed. Reg. 33,582, 33,605 (July 22, 1991) ("[U]nambiguous accuracy" is "the *sine qua non*" justifying a statistical adjustment.). But prior to this litigation, it was agreed that using a statistical estimate *in place of* an enumeration (like the appellants 10% NRFU sampling) was impermissible and no one contended, as the Solicitor General does here,

Roemer, 501 U.S. 380, 396 & n.23 (1991); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

Federal appellants nevertheless maintain that this clear repeal occurred in two ways. In the lower courts in these consolidated cases, while the federal appellants conceded that an exception from discretionary authority constituted a prohibition on the excepted activity, it asserted that an exception from a mandatory directive was not a prohibition. *House* JS 51a. Therefore, the alleged alteration of the second half of Section 195 from "discretionary" to "mandatory" in 1976 removed the prohibition on congressional apportionment sampling that existed prior to that amendment. For the first time in this Court, appellants now also maintain that Section 195, whether mandatory *or* discretionary, does not withdraw sampling authority for congressional apportionment and thus *never* prohibited congressional apportionment sampling even when Section 195 was in its "discretionary" form. Rather, we are now informed, the *only* obstacle that ever existed with respect to congressional apportionment sampling was Section 141's implicit prohibition of such sampling. Section 141 was therefore the only section that needed to be altered to vest the Secretary with authority to sample for congressional apportionment, even if Section 195 remained precisely the same. Br. I at 37. For the reasons that follow, neither version of the federal appellants' *post hoc* arguments construing the Secretary's authority can withstand scrutiny.

1. The federal appellants' principal argument here (and exclusive argument below) is that the 1976 amendments to the

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that Section 195 places *no* constraint on the Secretary's apportionment sampling discretion or that Section 195 *mandates* nonapportionment sampling. JA I 135; Memorandum of Walter Dellinger, Oct. 7, 1994, at 12-14; Statement of Sec'y Mosbacher, *supra*; Gerson Memorandum at 18 ("Section 195 on its face prohibits" either all statistical adjustment or, at a minimum, "a statistical adjustment carried out as a substitute for a headcount."). *See also Carey*, 508 F. Supp. at 414-15; *Young v. Klutznick*, 497 F. Supp. 1318, 1333 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

second half of Section 195 impose a "mandatory directive" to use sampling for all non-apportionment purposes. According to the federal appellants, this somehow authorized congressional apportionment sampling because an exception to a "mandatory directive," unlike an exception to discretionary authority, does not constitute a prohibition against the agency engaging in the excepted activity. Br. I at 29.

The short answer to this contention is that modification of the second half of Section 195 simply strengthened Congress' encouragement of sampling for authorized purposes, but did not *expand* the purposes for which sampling was authorized to encompass congressional apportionment. Changing the second half of Section 195 to say that the Secretary "should" or "must" sample, rather than "may" sample, in no way changes the fact that this encouragement or authorization extends only to those purposes of the census "except for" congressional apportionment. If Congress intended to alter the scope of the objectives for which sampling could be used, it would not have strengthened its directive to encourage sampling for *existing* purposes, but it would have expanded the purposes for which sampling could be used. This could reasonably be done only by eliminating the "except for" limitation contained in Section 195 and Congress deliberately chose not to do so.

To be sure, the 1976 Congress unanimously made the uncontroversial, "cost-saving" policy decision that the Secretary should use sampling for the numerous functions of the census that are not constitutionally required and which have no political effect on individual congressmen or their states. As the legislative history and Census Bureau's contemporaneous statements make absolutely clear, however, Congress never contemplated the controversial, unprecedented decision of altering the traditional method for conducting the only constitutionally-required purpose of the census, and the only one which so directly affected the political fortunes of members of Congress and the states they represent. To the contrary, "[t]he main purpose of the 1976 amendment [of Section 141] was to provide for a mid-decade census to be used for

purposes (not including apportionment)" and "[t]he legislative history evidences *no intention* to expand the scope of the Secretary's discretion." *Franklin*, 505 U.S. at 816 n.16 (Stevens, J., concurring) (emphasis added).

In this regard, it must be recognized that, according to the federal appellants, Congress granted the Secretary wholly unfettered authority to base congressional apportionment on sampling, or the "special surveys" authorized by Section 141, even if these "experimental" procedures remained *less accurate* than traditional enumeration. Gephart Br. at 30; JA I 348-49. There is no explicit or implicit requirement in Section 141 (or anywhere else in the Census Act) that sampling may be done only if it is as accurate as an enumeration, and there was no expectation that statistically estimating the number of, say, tractors in the United States would be more accurate than actually counting them. Rather, as the federal appellants correctly note, it was believed that the *sacrifices* in accuracy were justified by the cost savings entailed in sampling. Br. I at 30. Since the federal appellants maintain that the Secretary's authority for congressional apportionment sampling is found in Section 141, this necessarily means that Congress purportedly authorized the Secretary to statistically estimate the congressional apportionment population without cabining that discretion in any way and without regard to whether that statistical estimate was even arguably as accurate as an enumeration.[33]

Since all agree that it would be unconstitutional to replace a traditional enumeration with sampling unless that

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[33] Indeed, the federal appellants acknowledge that Congress exempted congressional apportionment from the "mandatory" strictures of Section 195 because it created the potential for the Secretary to use apportionment sampling even if it was less accurate than enumeration. Br. I at 30. But for the same reason that Congress would not *mandate*, under Section 195, that the Secretary engage in apportionment sampling if it were potentially less accurate, it would never have *authorized* the Secretary, under Section 141, to engage in apportionment sampling if it were potentially less accurate.

statistical estimate was more "accurate," the federal appellants' interpretation of the Census Act would vest the Secretary with authority to conduct a census that is manifestly unconstitutional under all theories. Moreover, even if sampling is purportedly more accurate, any use of it for congressional apportionment, at a minimum, raises serious constitutional concerns because it is not an "actual Enumeration." (*See infra* 41-50). Standing alone, these significant constitutional difficulties render the federal appellants construction of the Census Act unacceptable.[34] Wholly apart from these constitutional concerns, however, it is extraordinarily implausible that the 1976 Congress would micromanage the Secretary's methodology for determining the population of tractors, etc., through a statutory "mandate," but simultaneously enable the Secretary, for the first time in United States history, to determine politically sensitive congressional apportionment without providing any standard – including accuracy – for guiding this unprecedented discretion.

More generally, the appellants' argument is plainly wrong because an exception from a mandate does constitute a prohibition on agency action[35] and, in any event, the second

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[34] *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (A court "will construe [a] statute to avoid such [constitutional] problems unless such construction is *plainly contrary* to the intent of Congress.") (emphasis added); *Miller v. Johnson*, 515 U.S. 900, 923 (1995); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989); *Hooper v. California*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). Of course, the Court's decision in *Wisconsin* makes clear that an interpretation of the Census Act which prohibits sampling to determine the population for purposes of congressional apportionment would not pose any constitutional issues.

[35] There are numerous examples in the United States Code of statutes in which an exception from a mandate is a prohibition. *See, e.g.*, 22 U.S.C. § 5605(a)(1); 16 U.S.C. § 45(f); 7 U.S.C. § 79(j)(1); 22 U.S.C. § 2452a(b).

half of Section 195 is not a "mandatory directive." As a matter of common usage, an exception from a command is most naturally read as a prohibition. Thus, there would be no doubt that the following exception constituted a prohibition: "except for my grandmother's wedding dress, you shall take the contents of my closet to the cleaners." *House* JS App. 53a. In this example, the context makes clear that the exception constitutes a prohibition. Here, the 180-year practice of conducting the census on the basis of a headcount provides the context for determining the meaning of Section 195. This historical background strongly suggests that the exception in Section 195 was intended to continue the prohibition against sampling for Congressional apportionment. A contrary conclusion can only be reached by ignoring the long-standing history of the census and the grave constitutional concerns that would be raised by this interpretation.[36]

In any event, Section 195 is plainly not a "mandatory directive." Section 195 provides that "the Secretary shall, *if*

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[36] The language of the Constitution itself further refutes the government's contention that an exception to a requirement is not a prohibition. Specifically, Section 2 of the Fourteenth Amendment provides in relevant part that "when the right to vote . . . is denied to any of the male inhabitants of such State . . . *except for* participation in rebellion, or other crime, the basis of representation therein *shall be reduced* in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. amend. XIV, § 2 (emphasis added). Thus, the Fourteenth Amendment is mandatory insofar as it requires the relative representation of each state to be reduced to the extent adult males are disenfranchised. The amendment contains an exception to this mandatory rule for disenfranchisement of those who had participated in "rebellion" or other crimes. It is clear that this exception did in fact constitute a prohibition against penalizing (by reducing their population) states that disenfranchised sympathizers to the Confederacy. *See, e.g., Richardson v. Ramirez*, 418 U.S. 24, 43 (1974) (holding that the "except for" "language of § 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony"). Thus, the Fourteenth Amendment plainly demonstrates that an exception to a requirement does in fact operate as a prohibition against application of that provision.

he considers it feasible, authorize the use of the statistical method known as 'sampling'. . . . " 13 U.S.C. § 195 (emphasis added). On its face, Section 195 does not mandate the use of sampling, but simply requires it if and when the *Secretary*, in *his* discretion, considers it *feasible*.

This Court has consistently recoghized that such a formulation vests an administrative agency with discretionary authority and is not tantamount to a mandate. Thus, in *Anderson v. Edwards*, 514 U.S. 143, 154 (1995), the Court held that a federal statute providing that a state agency "shall . . . take into consideration any . . . income and resources of any child or relative claiming [AFDC assistance]" was permissive insofar as it "allow[ed]" states to take into consideration such income. Likewise, in *Young v. Community Nutrition Inst.*, 476 U.S. 974, 980 (1986), the Court concluded that a statutory provision specifying that the Commissioner of the Food and Drug Administration "shall" promulgate regulations "to such extent as he finds necessary" was a discretionary grant of authority. The conclusion that Section 195 must be construed as a permissive grant of authority is bolstered by the fact that it merely specifies that the Secretary consider whether sampling is "feasible." It is widely recognized that "statutory language such as 'feasible' . . . [is] language that on its face suggests a broad delegation to an agency to strike the policy balance." Laurence Silberman, *Chevron-The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821, 823 (1991). *See, e.g., American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 (1981); *id.* at 544 (Rehnquist, J., dissenting); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987) (recognizing that statutory language directing that an agency "shall as far as possible facilitate" certain activity is "precatory" not mandatory). In short, the statutory language specifying the "consideration" of the "feasibility" of sampling can only be understood as vesting the Secretary with discretion to sample. Indeed, construing Section 195 as appellants suggest would impose the entirely absurd requirement that the Secretary produce *two conflicting* sets of census population figures if he chose to base congressional apportionment on the traditional

enumeration, a result which presumably not even appellants would defend.[37]

Indeed, although their brief throughout refers to the current Section 195 as a "mandatory directive," the federal appellants concede in a footnote that Section 195 is not "mandatory" because the Secretary "retains meaningful discretion to determine whether sampling should be employed in a particular instance." Br. I at 28 n.14. Thus, even if an exception to a mandate did not constitute a prohibition, this

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[37] As appellants repeatedly note, the only population number needed for purposes of "apportionment of representatives" under Section 195 is each state's *total* population. Br. II at 30-31. Thus, under appellants' mandatory understanding of Section 195, *all* other population figures – including all racial data, family data and all "population figures for substate areas," such as counties – *must* be based on a sampling number. *Id.* at 31. These population figures within a state are not calculated for purposes of apportionment, but for other purposes, and thus must be done pursuant to sampling, even if the apportionment number is based on a traditional enumeration. Accordingly, under appellants' theory, if the Secretary after 1976 continued to conduct the census pursuant to a traditional enumeration, he could only use those traditional census figures for determining how to apportion congressional districts among the states. But, pursuant to the congressional mandate, he would also have to produce *another* census population figure, based on sampling, which differed from the traditional enumeration number. The substate population figures would have to be based on this sampling number, since those substate figures play no role in apportioning members of Congress among the states. Since no rational Secretary would go through the waste and confusion of producing two different population figures for each state, the only rational choice would be to use the sampling numbers for apportionment purposes as well. But even appellees agree that the 1976 Congress would have never *required* the Secretary to use sampling procedures for congressional apportionment, so Congress would have never effectively required such action by forcing the Secretary to either apportion on the basis of the sampling number or produce two, inconsistent census population figures. Needless to say, no Court and no one in the Commerce Department, including the *current* Commerce Department, has ever interpreted Section 195 in the manner the Justice Department now does for purposes of this litigation. *See* n.32, *supra*.

does not avail appellants here because it is now undisputed that Section 195 is not such a mandate.

2. Apparently recognizing this, and recognizing that the 1976 amendments to the Census Act cannot constitute an explicit repeal, the United States now alternatively argues that it is legally irrelevant whether Section 195 is "discretionary" or "mandatory," for it is not a prohibition in *either* event. Rather, Section 141 was and is the only limitation on sampling for congressional apportionment in the Census Act. Prior to 1976, Section 141's authorization to conduct a "census" was purportedly believed to implicitly forbid apportionment sampling (although it really did not). Thus, it is argued, amendment of Section 141 in 1976 to generally authorize sampling was all that was needed to authorize apportionment sampling, even if Section 195 remained wholly discretionary. Br. I at 32, 37-38.

While this would be a convincing argument if Section 141(a) were the only provision of the Census Act governing sampling, it is, for the reasons already noted, inherently erroneous because it ignores and eviscerates the plain limitation on the Secretary's authority contained in Section 195. The federal appellants apparently advance the following method of statutory construction. If Section A of the statute says, "except for congressional apportionment, sampling may generally be done," then the Secretary has no authority to sample for congressional apportionment. But if Section A says, "sampling may generally be done," and Section B says "except for congressional apportionment, sampling may generally be done," then the Secretary may use sampling even for congressional apportionment. But there is simply no reason to interpret these two statutes in a fundamentally different manner. Both plainly withhold authority to sample for congressional apportionment. Granting such authority under either version of the statute therefore renders the exception for congressional apportionment a nullity.

To be sure, the second version of the statute, like the Census Act, contains some redundancy in its treatment of sampling. But this redundancy is inherent in the fact that the

Census Act refers to sampling in two places that affect congressional apportionment, as well as two other sections that do not implicate congressional apportionment. *See* 13 U.S.C. §§ 141(d), 181. These multiple references to sampling necessarily overlap and must be coherently reconciled. The only way to do this is to either acknowledge that the more specific Section 195 delimits the general authority bestowed by Section 141(a) and (d) (and Section 181) or to conclude that Section 141 bestows an authority that is wholly independent of the constraints imposed by Section 195. For the reasons noted, it is clear that *both* parts of Section 195's specific guidance on census sampling – the stronger encouragement of sampling *and* the exclusion of congressional apportionment – govern and cabin the other statutory references.

Indeed, the federal appellants' extensive disquisition on the 1957 and 1976 amendments bolsters this point. The appellants' brief makes clear that everyone in 1957 and 1976 understood that Section 195 was the provision governing permissible use of sampling, without regard to whatever authorization or limitation was contained in Section 141. According to federal appellants, the alleged general prohibition on sampling contained in the 1957 version of Section 141 was overridden by Section 195's specific authorization of sampling. Br. I at 38 n.22. Just as Section 141's general *prohibition* on non-apportionment sampling in the 1957 version was overridden by Section 195's specific authorization, so too is Section 141's general *authorization* of sampling in the current version overridden by Section 195's specific limitation. Since it is undisputed that the 1976 Congress believed that Section 195 was the provision governing sampling, and it is clear that Section 195 withheld authority for apportionment sampling, the 1976 Congress could not have intended to vest such apportionment sampling authority without eliminating the "except for" language in Section 195.[38]

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[38] Although their entire argument is premised on the notion that Section 141 was a "pre-existing ban" on apportionment sampling prior to 1976, the federal appellants themselves simultaneously assert that Section 141 probably did not, in fact, prohibit sampling if it was supplemental to some effort at actual enumeration. Br. I at 36 n.19. Thus, according to federal appellants, even though Section 141 did not ban sampling before 1976, overturning this non-existent ban in 1976 was all that was needed to authorize apportionment sampling even though Section 195 continued to deny authority for apportionment sampling before and after 1976. Even if this were not the fifth different variation on the Justice Department's increasingly strained interpretation of Section 141, simply stating this argument would refute it.

III. THE DEPARTMENT'S SAMPLING PLAN VIOLATES THE CONSTITUTION'S PLAIN LANGUAGE.

1. It is seemingly common ground among the parties that a "significant change from the traditional method of conducting the census" is constitutional only if it is shown, or at least contended, that the statistical estimate will produce a *more accurate* tally than the traditional enumeration. JA I 133-35; Br. I at 36 n.19, 47; U.S. Br. in Opp. to Summ. Jgmt. at 14. But the Department's plan is still unconstitutional even under *appellants'* "improved accuracy" standard for it is *undisputed* that statistically estimating the 10 percent of the population not responding to census questionnaires is less accurate than actually following up and doing a headcount of those persons. *See, e.g.*, 1997 GAO Report at 26 ("Technically the *most accurate* design alternative, according to the results of the *Bureau's research*, would be to attempt 100-percent follow-up of nonrespondents and use ICM to address accuracy problems.") (emphasis added).

Indeed, we know that actually following up on the 12 million households excluded from the follow-up would be more accurate than the statistical estimate. Specifically, the *Report to Congress* contends that appellants will count *each* of the households which it has selected for nonresponse follow-up, and thus that they are entirely confident they will reach the goal of 90 percent of the households in each census tract. JA I 170, 88. By the same token, they could count each of the

households in the remaining 10 percent that they have arbitrarily excluded. These 10% of households are no more difficult to count than the nonresponding households who will be enumerated since the excluded 10% are *randomly selected*. JA I 90.

Why then is the Department statistically *estimating* the population of the remaining 10 percent of the households they know exist and are occupied, rather than actually following up and counting those people? The Department candidly acknowledges that it has nothing to do with improved accuracy or correcting any "undercount," but is being done solely to save time and money.[39]

Thus, even if the Constitution permits an upward adjustment to "correct" the "undercount" of people missed by traditional enumeration, the Department's plan is still invalid because it *substitutes* a statistical estimation for a headcount of known people who could be counted *more* accurately than estimated. Obviously, the administrative convenience of saving "time and effort" cannot justify departing from constitutional norms. Given that such a traditional headcount would yield more accurate results than simply assuming the excluded 10% have the same demographic characteristics of other nonresponding households, there is simply no basis for upholding the appellants' plan to use this less accurate assumption. A contrary conclusion would mean that the Constitution permits the Department to count 60% or 40% of the population and statistically infer the remainder to save "time and money."[40]

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[39] *See* Panel to Evaluate Alternative Census Methods, *Counting People in the Information Age* at 100 ("Whether to use sampling for NRFU in the 2000 census is mainly a policy decision about whether the expected cost savings from the use of sampling outweigh the likely decreases in the accuracy of counts and other data, particularly for small areas.") (*cited in Report to Congress*, JA I 54); JA I 89.

[40] In the court below, appellants maintained that this concededly less accurate 10% NRFU sampling policy is somehow immune from judicial invalidation because their *other* sampling policy – the ICM statistical adjustment *above* the initial 100 percent estimate to capture unknown persons – is purportedly more "accurate" than a 100% headcount of the known persons. Under this view, the appellants could decline to count any people over 70 years old and this arbitrary exclusion would be immune from judicial scrutiny so long as the census in the "aggregate" ensured that each state received a more "accurate" number of persons than it would through a headcount. Needless to say, federal courts have not only "the power but the duty" to enjoin *any* departure from constitutional norms. *Louisiana v. United States*, 380 U.S. 145, 154 (1965). These unconstitutional defects cannot be ignored – or cured – simply because *another* aspect of the census is alleged to be constitutional because it is more accurate.

2. The elaborate statistical estimate that the Department intends to undertake stands in stark contrast to the Constitution's simple but clear requirement that representation be apportioned in accordance with an "actual Enumeration" which "count[s] . . . the whole number of persons." U.S. Const. art. I, § 2; *id.* amend. XIV, § 2. Where, as here, the language of the Constitution is clear, this Court has consistently held that the plain language of the Constitution must be given effect and may not be contravened.[41] Here, the Constitution's language is quite straightforward and conducive to simple implementation.

Article I, Section 2 mandates that an "actual Enumeration" must serve as the basis of apportioning representation. The plain meaning of this provision was clear and unambiguous at the time of the Framing of the Constitution. In 1789, "enumerate" meant to "count" and plainly did not mean to "accurately estimate." *See, e.g.*, Samuel Johnson,

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[41] *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) ("As men, whose intentions require no concealment, generally employed the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 618 (1895) ("[T]he words of the constitution are to be taken in their obvious sense. . . . "); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838).

A Dictionary of the English Language (1773) (defining "enumerate" to mean "to reckon up singly, to count over distinctly"); Noah Webster, *American Dictionary of the English Language* (1828) (defining "enumerate" to mean "to count or tell, number by number; to reckon or mention a number of things, each separately").[42] Both "enumeration" and "enumerate" derive from the Latin word "*enumerare*" which meant to "count out." *Barnhart Dictionary of Etymology* (1988) 334. Indeed, the word "count" is often defined as "enumerate."[43]

"Enumeration," of course, is simply the noun for the verb "enumerate." Therefore, an "enumeration" is the act of enumerating, or counting, just as a prosecution is the act of prosecuting. Not surprisingly, then, enumeration is also defined as "the act of counting or telling a number, by naming each particular; an account of a number of things, in which mention is made of every particular article." Noah Webster, *American Dictionary of the English Language* (1828). *See*

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[42] *See also* John Walker, *A Critical Pronouncing Dictionary* (1794) ("enumerate" defined as "to reckon up singly, to count over distinctly"); Thomas Sheridan, *A General Dictionary of the English Language* (1780) (defining "enumerate" to mean "to reckon up singly, to count over distinctly"). Although modern dictionaries are irrelevant to a determination of the Framers' intent, they continue to adhere to this definition. *See, e.g., Webster's II New College Dictionary* (1995) (defining "enumerate" to mean "to name or count off one by one: list; to determine the number of: count").

[43] *See, e.g.,* Noah Webster, *American Dictionary of the English Language* (1870) (defining the term "count" to mean "to tell or name one by one, or by groups, for the purpose of ascertaining the whole number of units in a collection; to number; to *enumerate*") (emphasis added). Thus, Section 2 of the Fourteenth Amendment reinforces this constitutional command. U.S. Const. amend. XIV ("Representatives shall be apportioned among the several States according to their respective numbers, *counting* the whole number of persons in each State, excluding Indians not taxed.") (emphasis added). Thus, a census that is not based upon a "count" of the population does not satisfy either Article I, Section 2 or the Fourteenth Amendment.

also Samuel Johnson, *A Dictionary of the English Language* (1773) (defining enumeration as "the act of numbering or counting over").[44] Indeed, in *Wisconsin*, the Court used the term, "enumeration" in contradistinction to the scientific statistical adjustment or estimate proposed by appellants: "We are not sure why the fact that distributive and numerical accuracy correlate closely in an improved *enumeration* would require the Secretary to conclude that they correlate also for a PES-based *statistical adjustment*." *Wisconsin*, 517 U.S. at 21 (emphasis in original). *See also Franklin*, 505 U.S. at 803 (" '[A]ctual Enumeration' " is "a count of the persons 'in' each sstate".).

In the face of all this, relying exclusively on a *1933* version of *British* dictionary, appellants argue that "enumeration" means "the action of ascertaining the number of something; the taking [of] a census of population; a census." 3 *Oxford English Dictionary* 227 (1933). Br. I at 40. Thus, appellants assert that *any* "systematic" method of ascertaining a population number – even if the method of ascertainment is not a count, but a gross estimate – constitutes an "enumeration." But this effort at linguistic legerdemain drains the phrase "actual Enumeration" of any meaningful content, distorts even the one dictionary quoted from and is an anachronistic effort to impose 20th century ambiguity upon a phrase free from such ambiguity when enshrined in the Constitution.

The *Oxford English Dictionary,* like other modern dictionaries, defines enumerate as "[t]o count, ascertain the number of." When the dictionary then defines the noun emanating from this verb, it does not again specify that a "count" is the means of ascertaining the number of something, but that is plainly the intent, as further evidenced by the fact that each of the usage examples of "enumeration" is an actual count of

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[44] The phrase "enumeration" is also used in the Ninth Amendment. The meaning of "enumeration" in the Ninth Amendment is "the act of counting or telling a number, by naming each particular; and a count of a number of things in which mention is made of every particular article." Noah Webster, *American Dictionary of the English Language* (1828). Again, the clear sense of the term is individual counting or listing.

things or persons.[45] No dictionary anywhere lists "accurate estimate" as one of the possible meanings of enumeration.

In any event, it is hardly surprising that modern dictionaries list enumeration as a rough synonym for a census to ascertain a population since the decennial census to ascertain the population has always been done through an "enumeration" and thus the meanings of the two words have converged. But this in no way suggests that the Framers' usage of either "enumeration" or "census" denoted *any* means of ascertaining the population, including an estimate based on a partial headcount. Rather, both phrases, consistent with ancient historical practices, denoted an actual headcount of the population.[46] As appellants themselves note, the 20th century Commerce Department believed that its authorization to conduct the "census" prohibited it from using statistical sampling because "[i]t has generally been held that the term 'census' implies a complete enumeration," not a partial or initial enumeration supplemented by a statistical adjustment. Br. I at 33 (citations omitted).[47]

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[45] *See Oxford English Dictionary* 311 (1989). The 1577 example, referenced by appellants, is simply "that holy man did rightly know the enumeration of the sacred Trinitie." The "holy man" thus was able to list or count the Trinity.

[46] Webster defined "census" in the following manner: "(1) In ancient Rome, an authentic declaration made before the censors, by the citizens, of their names and places of abode. This declaration was registered, and contained an *enumeration* of all their lands and estates, their quantity and quality, with their wives, children, domestics, tenants and slaves of each citizen. . . . (2) In the United States of America, an *enumeration* of the inhabitants of all the States. . . . " *American Dictionary of the English Language* (1828) (emphasis added).

[47] Appellants' understanding of "enumeration" as a contentless standard that encompasses any methodology, however conjectural, of ascertaining the number of inhabitants is also irreconcilable with the requirement that there be an "actual" count. The term "actual" was uniformly understood at the time of the Framing to mean "really in act, not merely potential." John Walker, *A Critical Pronouncing Dictionary* (1794). *See also* Samuel Johnson, *A Dictionary of the English Language* (1773)

Finally, the appellants' proposed definition of "an actual enumeration" proves far too much because it authorizes a census methodology that is contrary to *all* parties' understanding of the Constitution's rule and the Framers' intent. If "enumeration" denotes *any* method of ascertainment, then the population could be apportioned on the basis of the "special surveys" (analogous to public opinion polls) that are allegedly authorized by the Census Act, without regard to whether this methodology is more accurate than a headcount. 13 U.S.C. § 141(a). But the first apportionment of Congress by the Constitutional Convention was itself based on a rough estimate of population and it is common ground that the "actual Enumeration" requirement was intended to henceforth forever foreclose using such a "conjectural rule" as the basis for

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("really in act; not purely in speculation"); Stephen Jones, *Dictionary of the English Language* (1801) ("real, true, positive"). Thus, the Constitution requires that the enumeration or count be "really in act." Appellants make the unwarranted suggestion that this Court should defer to the "second to last draft" of the Census Clause. Br. I at 43-44; *Nixon v. United States*, 506 U.S. 224, 231-32 (1993). It should be rejected as inconsistent "with the well-established rule that the plain language of the enacted text is the best indicator of intent." *Id.* If anything, the fact that the penultimate draft was not enacted suggests that the Framers *intentionally* rejected the penultimate draft's authorization to conduct the census in any manner Congress deemed acceptable. Moreover, the record of the Constitutional Convention confirms that the Framers sought to establish a "permanent and precise standard" of ascertaining the population that would "t[ie] the hands" of future Congresses so that they "could not sacrifice their trust to momentary considerations." *See* 1 *Records of the Federal Convention of 1787* 578, 580 (Max Farrand ed., 1911). The advantages of apportioning representation on the basis of a headcount were plain: "This [method] had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less open to fraud and evasion, than any other, which could be devised." II Joseph Story, *Commentaries on the Constitution of the United States* § 633 (1833). *See also* III Joseph Story, *Commentaries on the Constitution of the United States* § 676, at 143 (1833) ("[T]he rule" established by the Constitution was intended "always [to] work the same way in regard to all of the states, and be as little open to cavil, or controversy, or abuse, as possible.").

apportioning representatives. Br. I at 45 (quoting 1 *Records of the Federal Convention of 1787* 602 (Max Farrand ed., 1911).[48] Though appellants are at pains to emphasize that they seek to defend only a statistical adjustment that is more accurate than a physical headcount, their understanding of the term "enumeration" contains no such limitation and thus it must be supposed that the Framers authorized future Congresses to revive the rough conjecture underlying the first apportionment, even though all agree that was never to be repeated.

Appellants make the specious argument that the apportionment population has *never* been based on an individualized "headcount" of people, but an "aggregate" count. Br. I at 47. But the census population has always consisted solely of individuals who are observed and counted by another individual. To be sure, the person doing the counting of the individuals included was not always a federal employee, but often was the parent or spouse living in the household where the individual lived. Br. I at 48. But the fact that the census population was "reckoned singly" by someone other than a federal employee, and then reported to the federal census workers in "aggregate" numbers, is obviously of no import. Br. I at 47-48. The apportionment population still consisted only of individual "heads" actually observed and counted. Noah was doing a "headcount" of his Ark's population even though he was counting "two by two," rather than "one by one."

Here, however, the apportionment population, for the first time in our Nation's history, consists of tens of millions of "people" whose homes or bodies have never been seen by anyone either in the Department or anyone reporting to the Department. These "people" are assumed to exist only because people with the same skin color (or some other

[48] Appellants maintain that the first apportionment was based on considerations of states' future population and wealth, as well as current population. Br. I at 45 n.26. However that may be, all agree that the actual enumeration standard was intended to eliminate any conjectural ratio, whether the conjecture related to population or wealth. This objective would not have been achieved if the term "enumeration" included conjectural ratios.

demographic characteristic the Department deems dispositive) were missed by the initial enumeration but ultimately found in follow-up procedures. The "missing" people remain wholly unidentified by anyone and there is no tangible evidence – as opposed to a statistical inference based on tangible evidence – that they do exist. In short, the fact that prior census populations included individuals identified by *hearsay evidence* neither suggests that these prior efforts were other than "headcounts" nor that a census population may include people not identified by tangible evidence of any kind.

Appellants apparently believe that because statistical estimates have recently reached a level of precision never envisioned by the Framers, this means that such statistical estimates are equivalent to counts if "shown" to be more "accurate." But the confidence one has in an estimate does not change the fact that it is an estimate, and is not a count. By analogy, congressional elections are based on a count of the ballots cast for a candidate. Obviously this process is often not 100% accurate because ballots are lost or tallied incorrectly. Nevertheless, the Court would never allow congressional election results to be altered pursuant to a sophisticated, statistical regression analysis which "accurately" estimates the number of missing ballots and the voting patterns of the missing voters, based on race, etc. The Constitution similarly does not tolerate deciding congressional *apportionment* on estimates that experts consider reliable, and for the same reason. Regardless of how honest that statistical computation is, the estimate (and corresponding adjustment) necessarily is based on assumptions not susceptible to empirical proof or disproof.[49] As such, they are inherently subject to manipulation and/or expert judgments that courts (or others)

[49] For example, the appellants' plan assumes that wealthy Park Avenue socialites are just as likely to be counted by the census as Arabs and Hasidic Jews in Buffalo because *all* are urban "whites and others." JA II 117. As Secretary Mosbacher stated: "The models used to infer populations across the nation depended heavily on assumptions, and the results changed in important ways when the assumptions changed." 56 Fed. Reg. 33,582, 33,585 (July 1991).

cannot reliably verify. By definition, then, a statistical adjustment cannot constitute the permanent, precise standard required by the Framers.

Barring the use of statistical estimates for apportioning the population plainly does not, as appellants suggest, constitute judicial usurpation of Congress' authority to determine the "manner" in which the actual enumeration is conducted. Br. I at 41. The Court, rather, would simply be determining whether appellant's plan *constitutes* an "actual Enumeration," an interpretive function the Court must perform for all language in the Constitution. While it is for Congress to determine the method of conducting the "actual Enumeration," it is for the Court to determine what an "actual Enumeration" is. Congress has the unfettered authority to make the myriad decisions on how to best conduct the headcount, and this methodology has significantly changed over the years. But Congress cannot do something *other than* an "actual Enumeration" and remain " 'consistent with the constitutional language . . . . ' " *Wisconsin*, 517 U.S. at 15 (quoting *Franklin*, 505 U.S. at 804).

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MATTHEW GLAVIN, et al., Plaintiffs,	)	
v.	)	Civil Action No. 98-207-A
WILLIAM J. CLINTON, et al., Defendants.	)	

ORDER

(Filed Oct. 19, 1998)

This motion comes before the Court on the plaintiffs' motion to clarify that Plaintiffs' motion to amend Complaint and Plaintiffs' second motion to amend Complaint have been granted, and to clarify that Delaware County, Pennsylvania, Bucks County, Pennsylvania and DuPage County, Illinois are plaintiffs to this action. It appearing to the Court that the additional plaintiffs were included in oral argument at the time of the hearing on August 7, 1998, and whereas the plaintiffs' have moved for further clarification, it is hereby

ORDERED that Plaintiffs' motion to amend Complaint is GRANTED, and Plaintiffs' second motion to amend Complaint is GRANTED, and Delaware County, Pennsylvania, Bucks County Pennsylvania and DuPage County, Illinois are plaintiffs to this action.

Judges Widener and Jackson concur.

/s/ Claude M. Hilton
CHIEF JUDGE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
October 19, 1998

(8)

Supreme Court, U.S.
FILED
OCT 20 1998
CLERK

No. 98-564

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

V.

MATTHEW GLAVIN, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE *AMICUS CURIÆ* DISTRICT OF COLUMBIA STATE DEMOCRATIC COMMITTEE IN SUPPORT OF THE APPELLANTS

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STATEMENT OF INTEREST OF THE *AMICUS CURIÆ*

The District of Columbia State Democratic Committee represents the Democratic Party and its thousands of electors in the Nation's Capital. As such, the *Amicus Curiæ* has an important interest in making sure that all electors in the District of Columbia receive their equal rights, proper representation, and proper allocation of Federal programs. This case implicates all of these fundamental concerns of the *Amicus Curiæ*. The vital importance of these issues to the District of Columbia State Democratic Committee led it to participate as *Amicus Curiæ* before the three-judge panel of the United States District Court for the District of Columbia in the companion case to this cause, *United Sates Department of Commerce, et al. v. United States House of Representatives, et al., jurisdiction noted*, 67 U.S.L.W. 3169 (U.S. Sept. 10, 1998) (No. 98-404). As with its memorandum to the District Court, this brief is limited to certain historical and linguistic matters concerning the constitution and the census. Although the courts below did not reach the constitutional issues, the Solicitor General raised the matter in both of his Jurisdictional Statements. As soon as the *Amicus Curiæ* learned of this situation, it prepared this brief. Its goal is to provide this Honorable Court with more complete information than the parties could devote to the matter in their briefs.

SUMMARY OF ARGUMENT

In this case, the Appellees apparently claim that the words "actual enumeration" in the Census Clause of the United States Constitution requires a "headcount" to the exclusion of all other methods, including the statistical estimation technique suggested by the Census Bureau. Such a reading is inconsistent with the provisions of the Constitution and makes the last phrase of the Census Clause meaningless. In addition, it is clear from an examination of

contemporary dictionaries and the words of the Founders themselves that the terms "enumeration" and a "census" were two words for identical concepts. Those concepts do not exclude any particular census methodology that complies with the basic rationales of the Census Clause. In addition, non "headcount" techniques such as estimations are within the meaning of the words the Framers chose.

The history of the Census Clause in the Federal Convention demonstrates that the Framers did not incorporate a precise census methodology, but wanted the most accurate number obtainable given the technology and techniques of the time. That intent was carried through during the history of the early censuses. The early censuses attempted many different methods to count those people who could not be contacted. This is the same goal that the Census Bureau has for its plan for the 2000 census. Thus, not only is the "headcount" method not the only permissible system, but the Census Bureau's statistical estimation proposal falls squarely within the country's constitutional traditions.

I. INTRODUCTION

There is no question that the decennial census is among the most important functions performed by the Federal Government. It serves as the basis for the apportionment of representatives in the United States Congress. But its constitutional significance goes further. Both the Congress and the President make extensive use of census data in exercising their powers under the United States Constitution. [1] The same is true for the States under their constitutions and

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[1] This is the view extending from the beginning of the Republic. *See, e.g.*, remarks of Hugh Williamson (who was a delegate to the Fedeal (continued...)

the localities under their charters. Thus, the census in all its uses, not just Congressional apportionment, plays an important role in the constitutional scheme. As James Madison explained to the Virginia ratifying convention, "The census in the Constitution was intended to introduce equality in the burdens to be laid on the community." 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA [3] 1343 (John P. Kaminski & Gaspare J. Saladino, eds., 1993).

The core constitutional question presented in this litigation is whether the Census Clause of the Constitution, Article I, Section 2, Clause 3, either prescribes or proscribes any particular methodology in determining the number of inhabitants in the United States so long as its fundamental purposes are met. This examination must take place in the context of the particular proposal under consideration. In sum, it appears that the Census Bureau will attempt to contact every person through either a mailing or an enumerator. When, as all parties agree is inevitable, not all Americans respond to these entreaties, the Bureau intends to determine the amount and distribution of non-answerers through statistical sampling and estimation techniques. It will then aggregate the number of answerers and non-answerers to arrive at the final census count. The Appellees apparently believe that this action is inconsistent with the language of an "actual enumeration" in the Census Clause. However, neither the language nor the history of the Clause (nor its early

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[1] (...continued)
Convention) in the First Congress stating that Congress could not exercise its authority regarding the militia in the absence of census information. 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, DEBATES IN THE HOUSE OF REPRESENTATIVES, THIRD SESSION: DECEMBER 1790-MARCH 1791, 189 (William DiGiacomantonio, et al., eds., 1995).

implementation) supports such a conclusion.

A construction and history of the Census Clause that requires one specific way of conducting the census seems to be at odds with the Constitution itself. For example, the Framers were far from disapproving the use of estimates in important government decisions. In fact, the Constitution explicitly endorses and employs estimations for Congressional action. When voting on any method before them, a specific tally of members' votes is taken only if twenty percent of those present request it. U.S. CONST. art. I, § 5, cl. 3. Absent such a request, measures are passed or defeated by voice vote, which is nothing but an aural estimation by the Chair as to which side has more votes.[2/] This procedure has been employed since the beginning of the Congress under the Constitution. Clearly, the Founders were not allergic to estimations for constitutional purposes.

More importantly, if a census methodology is "locked in," a part of the Census Clause become superfluous. The Clause commands that the Census be taken "in such Manner as they shall by Law direct." U.S. CONST art. I, § 2, cl. 3. This phrase can only mean one of two things. First, it could mean that the Federal Government has the discretion to prescribe any of various ways for obtaining the number and distribution of people in the United States. Second it could mean that the Congress is simply given the authority to determine how many enumerators it will hire, how much it will pay them, and other administrative matters. However, this latter construction is highly implausible because such

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[2/]This system was established at the very beginning of the Republic. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE UNITED STATES SENATE, §41.1 (1801), *reprinted as* S. Doc. No. 103-8, at 73 (1993).

authority is already granted in the Necessary and Proper Clause. U.S. Const art. I, § 8, cl. 18. Thus, the only meaning of the last phrase of the Census Clause that makes sense is that the Constitution did not freeze a census methodology and left it to future generations of the Government to determine the best way to get the best numbers.

II. THE PLAIN MEANING OF THE WORDS "ACTUAL ENUMERATION" DOES NOT COMPEL A PARTICULAR METHODOLOGY FOR TAKING THE CENSUS.

The examination of the Census Clause begins with the words of the Constitution. The clause reads, in relevant part, that, "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." In the Capitation Clause, the Constitution expressly equates the words "actual Enumeration" with a "Census." U.S. CONST art. I, § 9, cl.3. Thus, it is clear from the text of the Constitution that the words "actual enumeration" had no special significance, and meant the same thing as a "census." Despite the fact that the Framers, almost uniquely in the Constitution, self-defined a particular term, the Appellees apparently believe that the choice of the words "actual enumeration" compels what they term a "headcount, " i.e., a list of every individual in the United States that is generated solely by a direct Census Bureau contact, and prohibits any other method of finally determining the number of inhabitants of the United States. The words "actual enumeration," however *do not* constrain the Government's census methodology.

This Court and its members have turned to a number of Eighteenth Century dictionaries to determine whether the

contemporary meanings of particular words in the Constitution lead to a definitive construction of a particular clause. Examining the three Eighteenth Century dictionaries this Court uses most frequently demonstrates that, so long as its basic purposes are met, the words the Framers chose for the Census Clause neither requires nor prohibits any particular manner of determining population.

One dictionary this Court and its members often consult is THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia, 6th ed. 1796).[3] *Nixon v. United States*, 506 U.S. 224, 229 (1993); *United States v. Lopez*, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 647 (1989) (Stevens, J., concurring in part, dissenting in part); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 295 (1989) (Brennan, J., concurring in part, dissenting in part). That dictionary, like all the Eighteenth Century dictionaries surveyed for this Memorandum, does not define the word "census." However, both the friends and the opponents of the new Constitution understood that a "census" was the same thing as an "enumeration."[4] Sheridan defines

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[3] All the Eighteenth Century dictionaries referred to herein are arranged alphabetically and are unpaginated.

[4] *See, e.g.*, 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, PENNSYLVANIA 536 (Merrill Jensen, ed., 1976) (Remarks of Thomas McKean, Chief Justice of the Pennsylvania Supreme Court, before the Pennsylvania Ratifying Convention in favor of the Constitution equating an enumeration and a census); 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VIRGINIA [2] 821 (John P. Kaminski & Gaspare J. Saladino, eds., 1990) (9 DHRC) (Letter of George Mason to John Lamb, June 9, 1788, enclosing Virginia Anti-Federalist
(continued...)

"Enumeration." The definition, in full, is, "The act of numbering or counting over."[5] Neither the words "act" nor "over are relevant to resolving the question presented in this case. However, the words "numbering" and "counting" offer considerable guidance.

Of course, the mere words "numbering" or "counting" do not, in themselves, tell how the "numbering" or "counting" may be done. On could count in base eight, for example. Further lexicographic examination sheds light on this matter. The definition of the verb "To number" is, "To reckon how many; to reckon as one of the same kind." The definition of the verb "To count" is, "To number, to tell; to reckon; to

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[4] (...continued)
constitutional amendments equating a census and an enumeration).

[5] Curiously, given their reliance on the precise words of the Constitution, the Appellees in the court below relied more on the verb, "To enumerate" rather than for the actual word of the Constitution, "enumeration." Happily, this Court need not referee this matter. To the extent there is any definitional difference, the most precise explanation of the idea *must* lie where the definitions coincide. This edition of Sheridan's DICTIONARY defines, "To Enumerate" in full as, "To reckon up singly; to count over distinctly." "Reckon" and "count," both of which are discussed in the main text, form the basis of this definition as it does for the ultimate meaning of "enumeration." Thus, "To Reckon" and "To Count" as the core meaning of both "To enumerate" and "enumeration," are the relevant terms for examination. Further, the odd words out in the definition of the verb "To enumerate" do not significantly change the meaning of the concept. "Distinctly" is defined in full as, "Not confusedly; plainly; clearly." No one claims that the Bureau's plan is not done "distinctly" in this sense. Similarly, "Singly" means, "Individually; particularly. " The definition for "Particularly" is, "Distinctly; singly; not universally; an extraordinary degree." Therefore, this definition seems to indicate that, "to enumerate" is a reckoning that is, "not universal[]," and thus does not necessarily require a listing of every individual member of a particular class.

account; to impute to; to charge to." It is clear that the common term, "To reckon," is key in determining the numbering or counting of an enumeration. "To reckon" is, "To compute; to calculate. . . ."[6/] Thus, we can see that an enumeration can encompass mathematical action to arrive at a count, because a "calculation" is, "A practice or manner of reckoning; the result of mathematical operation"and, "To calculate" is, "To compute; to reckon; to project for any certain end."[7/] It is clear that "reckoning," the heart of the meaning of "enumeration," and estimation (as the Census Bureau proposes) are related activities. This is clear because the full definition of an "Estimate" closely tracks the "To reckon" definition as a, "Computation; calculation; valuation; opinion; judgment."[8/] Thus, when examined in detail, it is clear that the concept of "enumeration" was not a static concept that defined a particular manner of counting. It most certainly did not exclude an estimate.

This Court and its members frequently consult another Sheridan work: THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (London, 1780). *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 614 n. 7 (1993); *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring);

[6/]The definition in full is, "To compute; to calculate; to state an account; to pay a penalty; to lay a stress or dependence upon. A second definition is, "To number; to esteem; to account."

[7/]The definition in full of "To compute" is, "To reckon; to calculate; to count."

[8/]The "To estimate" definition is, "To rate; to adjust the value of, to judge any thing by its proportion to something else; to calculate; to compute."

The "Estimation" definition is, "The act of adjusting proportioned value; calculation; computation; opinion; judgment; esteem; regard; honor."

Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia, J., dissenting). Not surprisingly, this dictionary provides a similar analysis. The definition of "Enumeration," in full, is, "The act of numbering or counting over." Again, neither the words "numbering" nor "counting" in themselves limit how the numbering or counting may be done. As before, the definitions of the verb forms of "number" and "count" demonstrate the mathematical nature encompassed in "counting" and "numbering." "To number" means, "To count, to tell, to reckon how many. . .."[9/] "To count" means, "To number, to tell; to reckon. . ."[10/] The common threads in these definitions are "to tell" and "to reckon." As before, "To tell," that has the same definition quoted above and that provides little useful information for the purposes of this case. The latter definition, "to reckon," is far more helpful. "To reckon" is, "To compute, to calculate. . ."[11/] Once more, both "compute" and "calculate" imply more than a simple list and include mathematical activity beyond a simple listing. The dictionary definitions confirm this. The full, somewhat circular, definition of "Compute" is, "To reckon, to calculate, to count." The mathematical action is more clearly set out in

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[9/]The full definition "To number" is, "To count, to tell, to reckon how many; to reckon as one of the same kind.

[10/]There are two definitions listed for the verbal form of "To count." Their full definitions are first, "To number, to tell; to reckon, to account, to consider as having a certain character; to impute to, to charge to," and second, "To lay a scheme; to depend on."

[11/]There are two definitions listed for the verbal form of "To reckon." Their full definitions are first, "To number, to count; to esteem, to account." and second, "To compute, to calculate; to state an account; to pay a penalty; to lay stress or dependence upon."

The full definition of "Reckoning" is, "Computation, calculation; accounts of debtor and creditor; money charged by host; account taken; esteem, account, estimation."

"Calculate" which is fully defined as, "To compute, to reckon; to adjust to project for any certain end." Clearly then, an enumeration is a counting or numbering which is a reckoning. The definition of reckoning, leads to a computation or calculation, which is an adjustment or projection for a certain end. As before, then, the definitions in use at the time of the Founding do not provide a methodological limitation on the census. Indeed, they seem to encompass the Census Bureau's proposed estimation. This is clear because the core of "enumeration, a reckoning, can involve calculation and computation. An "Estimation," which is "the act of adjusting proportioned value; calculation, opinion; judgment; esteem; regard; honor, "falls squarely into the concepts available to the Founding Fathers.

Finally, a similar analysis may be made with yet another Eighteenth Century dictionary used by members of this Court, JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY AND EXPOSITOR OF THE ENGLISH LANGUAGE (London, 1791). *See, e.g., Austin, supra*, 509 U.S. at 614, n.7; *Helling v. McKinney*, 509 U.S. 25, 37 (1993) (Thomas, J., dissenting); *Grady, supra*, 495 U.S. at 529 (Scalia, J., dissenting). As with the Sheridan dictionary, the full definition of "Enumeration" is, "The act of numbering or counting over." "To Number" is defined in its entirety as, "To count, to tell, to reckon how many; to reckon as one of the same kind." "To Count" means, "To number, to tell; to reckon, to account. . ."[12] Again, the common terms are "to tell" and "to reckon." The definition of "To reckon" states

[12]There are two verbal definitions of "to count." The first is, "to number, to tell; to reckon; to account; to consider as having a certain character; to impute to, to charge to." The other definitions "to lay a scheme; to depend on."

that it is, "To compute, to calculate. . . ." [13] The full definition of "Compute," once more, is "To reckon, to calculate, to count." Similarly, the full definition of "To calculate" is, " To compute, to reckon; to adjust, to project for any certain end," and the full definition of "Calculation" is, "A practice or manner of reckoning; the art of numbering; the result of arithmetical operation." Again, mathematical action is seen in these definitions. This is made even more clear by the definition of "To account" (part of the definition of "To count") which is, "The state or result of a computation; value or estimation. . .."[14] Thus, Estimation was expressly within the meaning of counting at the time of the Founders. At the least, it seems clear that no one technique that complies with the basic requirements of the Census Clause can be excluded by the words of the Constitution.

The Appellees also rely upon the word "actual" before "enumeration" in the Census Clause in an attempt to provide a textual limitation on census methodology and an exclusion of estimation techniques. A similar lexicographic analysis demonstrates that this contention is likewise meritless. All three dictionaries examined above employ identical definitions of this word. Their entire definition of "Actual"

[13]There are two verbal definitions of "To reckon." The first, in full, is, "To number, to count; to esteem, to account. The second, in full, is, "To compute, to calculate; to state an account; to pay a penalty; to lay stress or dependence upon."

The word "Reckoning" is defined in full as, "Computatiou [sic.], calculation; accounts of debtor & creditor; money charged by a host; account taken; esteem, account, estimation."

[14]The full definition of "Account" is, "A computation of debts or expenses; the state or result of a computation; value or estimation; a narrative, relation; the relation & reasons of a transaction given to a person in authority; explanation; assignment of causes."

is "Really in act, not merely potential; in act, not purely in speculation." As described, the Bureau's proposed methodology, relying on a combination of lists of persons contacted and well-established statistical analysis of data, does not appear to be either "merely potential" or "purely in speculation" by any reasonable meaning of those terms. Thus, the Eighteenth Century definition of the word "actual" does not prohibit the Census Bureau's 2000 census plans.

In sum, at the time of the Founding, the definitions and concepts of "actual" and "enumeration," do not appear to have fixed meanings of only a simple recitation or a simple list of elements in a set made by direct contact. Rather, their meanings are much less specific. "Actual" only meant something not wholly speculative, which a properly grounded statistical estimate is not. Similarly, while an "enumeration" could mean a simple list, it could also encompass mathematical activity including, and explicitly, by the meanings of the day, an estimation. At the very least, so long as it complies with the basic census rationale, it does not exclude or require a particular methodology. Simply put, the ordinary meaning of the words of the Constitution during the Framers' era does not either prescribe or proscribe a particular methodology (including estimates) in determining the number of persons in an enumeration. Accordingly, a linguistic claim that an "actual enumeration," as that term would have been reasonably understood by the Founding generation, necessary excludes the type of estimation proposed by the Census Bureau is simply incorrect.

III. THE HISTORY OF THE CENSUS CLAUSE DOES NOT COMPEL A PARTICULAR METHODOLOGY IN CONDUCTING THE CENSUS.

The term "actual enumeration" cannot be torn from its

historical moorings, particularly in the deliberations of the Federal Convention. It is clear from that record that, in so far as the Founders conceived of a methodology or outcome for the census, they were reacting to a specific problem and wished to avoid its repetition. However, beyond this, the record does not support the Plaintiff's view that the Census Clause compels a particular census methodology.

The idea of a national population figure is almost as old as the United States itself. In Article IX of the first draft of the Articles of Confederation (submitted on July 12, 1776), the drafting committee called for all expenses of the United States to be apportioned to, and provided by, each Colony; it also required each Colony to submit a triennial account of its population. 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, CONSTITUTIONAL DOCUMENTS AND RECORDS, 1776-1787, 80 (Merrill Jensen, ed., 1976) (1 DHRC). Although that method of revenue, along with the census provision, dropped out of the final form of the Articles of Confederation, the subject reappeared not long after the end of the Revolution.[15]

In an attempt to secure an adequate revenue, the Confederation Congress submitted a proposed alteration to the Articles that would have apportioned the expenses of the Federal Government among the States according to their population. The proposed Article also directed that the "number [of inhabitants] shall be triennially taken and transmitted to the United States in Congress assembled, in

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[15] Article IX of the final Articles of Confederation did require the States to provide troops "in proportion to the number of white inhabitants in such state," but did not provide a means for determining the number of inhabitants, 1 DHRC at 91, a defect New Jersey sought to remedy by amendment. *Id.* at 116.

such mode as they shall direct and appoint." *Id.* at 147-50. In considering this Amendment, the Confederation Congress attempted to determine the populations of the States. It found that it could not accurately do so because it lacked authoritative population figures. As the Congress lamented, only the small states of

> New Hampshire, Rhode Island, Connecticut and Maryland produced authentic documents of their numbers; in affixing the number of the other States the Committee were obliged to govern themselves by such information as they could obtain.

24 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, 230-31 (Gaillard Hunt, ed., 1922).

The situation had not improved by the time of the Federal Convention. In attempting to arrive at the original apportionment of Representatives, the Framers and the Ratifiers found that there was *no* authentic evidence of the population of the United States to which they could turn. 1 DHRC 298. Thus, the Founders resorted to various figures of doubtful provenance and even more doubtful accuracy. In fact, it appears the Framers did not even have an uniform set of numbers for use among themselves.[16] Still other figures were in circulation during the ratification period. 18 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE

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[16] *Compare* the population figures used by William Patterson (Delegate from New Jersey) with those used by David Brearley (Delegate from New Jersey), 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 572-73 (Patterson), 573-74 (Brearley) (Max Farrand, ed., 1937) (I Farrand) with those made public by Charles Cotesworth Pinckney at the South Carolina ratifying convention. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 283 (Jonathan Elliot, ed. 2nd ed., 1907) (4 ELLIOT'S DEBATES).

CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 391 (note) (John P. Kaminski & Gaspare J. Saladino, eds., 1995). All of these were openly acknowledged by the Framers,[17], the Ratifiers,[18] and those who implemented the Constitution in the First Federal Congress,[19] to be inaccurate and without reasonable basis.

In short, the situation that the members of the founding generation faced was the need to make governmental decisions based on *wholly* speculative numbers. Circumstances required them to make those decisions. But they were, as Governeur Morris (Delegate from New York) noted during the Federal Convention, "little more than a guess." I Farrand 560. *See also id.* at 579 (Edmond Randolph (Delegate from Virginia) commented that ratio for the first allocation of Representatives was "a mere conjecture"); 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, 359 (Max Farrand, ed., 1937) (II Farrand) (James Madison (Delegate from Virginia) characterized the original number of Representatives "as conjectural"). What the Framers meant in providing for an "actual enumeration" was simply to avoid this "purely in speculation" situation (as the

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[17] 16 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE [4] 509 (note) (John P. Kaminski & Gaspare J. Saladino, eds., 1986).

[18] 9 DHRC 921 (Remarks of George Nicholas in the Virginia Ratifying Convention); 4 ELLIOT'S DEBATES 31-32 (Remarks of Mr. Spaight in the North Carolina Ratifying Convention).

[19] 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 203 (Kenneth R. Bowling & Helen E. Veit, eds., 1988).

dictionaries noted above defined "actual"). The plan offered by the Census Bureau, based on large volumes of hard data and well-defined statistical techniques, is nothing like the situation the Framers wished to avoid.

Beyond this, the history of the Census Clause offers little in interpretive information that is relevant to this litigation. The Federal Convention first seriously addressed the need for a census after it settled the long, tortured debate on representation in Congress by adopting the "Connecticut Compromise." On July 10, 1787, Edmund Randolph introduced a motion,

> That in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every Years thereafter -- and the Legislre. arrange the Representation accordingly.

I Farrand 570-71 (blank space in original). The Convention then moved to a substitute amendment from Hugh Williamson (Delegate from North Carolina),

> That in order to ascertain the alterations that may happen in the population and wealth of the several States a census shall be taken of the free inhabitants of each State, and three fifths of the inhabitants of other description on the first year after this form of Government shall have been adopted -- and afterwards on every term of years; and the Legislature shall alter or augment the representation accordingly.

Id. at 575 (blank space in original).

The original opposition to these motions came from Gouverneur Morris (Delegate from Pennsylvania) and Roger Sherman (Delegate from Connecticut). They defined the terms of the Census Clause debate. Their concern was not with a census or with how a census would be accomplished. Rather, both men objected to requiring the legislature to reapportion itself on a regular schedule. *Id.* at 571, 578. George Mason (Delegate from Virginia) responded to this. Like his colleagues, Mason did not address the issue of how to take the census, but the issue of how to the use the census. He believed that regular reapportionment, according to a fixed schedule, and according to a fixed ratio of representatives per person, was necessary. *Id.* at 578.[20] It was this divide, along with the related questions of the three-fifths clause, whether wealth should be part of the basis for Representation, and the relative representation among the States, that dominated the discussion on the matters that would eventually become the Census Clause. Indeed, technical matters directly related to the census, such as when the first one should be conducted, seems to have engendered virtually no discussion, *id.* at 588, before the Williamson substitute was defeated. *Id.*

The Convention revisited and settled this issue the next day, July 12, 1787. They first approached the matter by passing a motion by Gouverneur Morris, "that direct taxation ought to be proportioned to representation." *Id.* at 591-93.

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[20] It is clear that Mason's call for a

> Revision from time to time according to some permanent & precise standard as essential to ye. fair representation required in the 1st. branch

referred only to the frequency of the census and the requirement for apportionment; it was not a standard on how to take the census. *See* I Farrand 582 (Remarks of Roger Sherman that he agreed with Mr. Mason "that the *periods* & the *rule* of revising the Representation ought to be fixt by the Constitution." (Emphasis in original)).

This reopened the debate on the three-fifths clause and the relation between wealth and representation. It also brought forth another motion by Edmund Randolph integrating the census with reapportionment.[21/] This was quickly superseded by a Motion from James Wilson (Delegate from Pennsylvania) that combined Gouverneur Morris's and Edmund Randolph's motions. [22/]

In considering these motions, the Convention again debated the three-fifths compromise, the frequency of the census (and thus reapportionment), and (briefly) the timing of the first census. The Convention finally adopted the following:

[21/]Mr. Randolph's motion was,

> And in order to ascertain the alteration in the representation which may be required from time to time by the changes in the relative circumstances of the States -- Resolved that a Census be taken within two years from the first meeting of the Legislature of the United States, and once within the term of every years afterwards of all the inhabitants of the United States in the manner, and according to the ratio recommended by Congress in their resolution of. and that the Legislature of the United States shall arrange the representation accordingly..

Id. at 589, 594 (blank space in original).

[22/]The motion of Mr. Wilson was,

> Provided always that representation ought to be proportioned according to direct Taxation , and in order to ascertain the alteration in the direct Taxation which may be required from time to time by the changes in the relative circumstances of the States -- Resolved that a Census be taken within two years from the first meeting of the Legislature of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18. 1783 -- and that the Legislature of the United States shall proportion the direct Taxation accordingly.

Id. at 590, 595.

> Provided always that representation ought to be proportioned according to direct Taxation and in order to ascertain the alteration in the direct Taxation which may be required from time to time by the changes in the relative circumstances of the States -- Resolved that a Census be taken within six years from the first meeting of the Legislature of the United States and once within the term of every Ten years afterwards of all the inhabitants of the United States in the manner and according to the ratio recommended by Congress in their resolution of April 18, 1783 -- and that the Legislature of the U.S. shall proportion the direct Taxation accordingly.

Id. at 591, 595-96.

That concluded the Federal Convention's substantive consideration of the census portion of the Constitution. On July 16, 1787, the Convention formally adopted the provision. II Farrand 14, 15. In late July, the matter was referred to the Committee on Detail along with all the other resolutions passed by the Convention up to that time. 1 DHRC 255, 258. It appeared in the first draft (August 6, 1787) of the Constitution prepared by the Committee on Detail as Article VII, Section 3. The draft clause read, in its entirety:

> The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the

said Legislature shall direct.

1 DHRC at 264-65. By the second (September 10, 1787) draft of the Committee on Detail, the Convention made only two minor changes, deleting the words "white and other" and changing the time for the first census from six to three years.[23] Thus, the provision in the September 10 draft of the Committee on Detail read:

> The proportions of direct taxation shall be regulated by the whole number of free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, (except Indians not paying taxes) which number shall, within three years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such manner as the said Legislature shall direct.

1 DHRC at 278.

It was not until the September 12 report of the draft Constitution by the Committee on Style that the Census Clause as found in the Constitution took its final wording. *Id.* at 286. Unsurprisingly, there is no other substantive discussion of the meaning or methodology in the records of the Federal Convention, of the ratification debates, or of the

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[23] These changes were made on August 20, 1787. The former provision was deleted because it was deemed superfluous, although James Madison recorded no further discussion of the matter. II Farrand 339, 350. Madison recorded no debate on the reason for the change of the latter provision. *Id.*

First Federal Congress which implemented the first census.[24]

The choice of the words "actual enumeration" in the Constitution was not meant to specify a particular procedure. That wording was a late choice of nomenclature by the Committee on Style. This Court has found, in accordance with the commands of the Federal Convention, that the

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[24] Unsurprising because, as Alexander Hamilton, who was a delegate to the Federal Convention, explained to the New York Ratifying Convention, he, and the Federal Convention, were

> disposed not to dwell long on curious speculations, or pay much attention to modes and forms; but to adopt a system whose principles have been sanctioned by experience, adapt it to the real state of our country, and depend on probable reasonings for its operation and result.

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 251 (Jonathan Elliot, ed., 2nd ed., 1907). What little discussion there is on the method of a census is so vague as to provide little, if any guidance. *See, e.g.*, 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, 1789-1791, DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION: JANUARY-MARCH 1790, 14 (Helen E. Veit, et al., eds., 1994) (Remarks of Benjamin Goodhue: "the mode of enumerating the inhabitants of the several states, depended a good deal upon certain local regulations, and consequently required the circumstance of local information in those who were to bring forward the bill, this he apprehended would be best attained by forming the committee a member from each state.") *See also id.* at 61 ("Mr. Benson observed, that the purport of this enumeration was more particularly intended for the purpose of ascertaining the true representation"); *id.* at 136-37 (Remarks of Mr. Madison in support of a broad economic and social census, "If the object to be attained by this particular enumeration be as important in the judgment of this house, as it appears to my mind, they will not suffer a small defect in the plan, to defeat the whole. And I am very sensible, mr. speaker, that there will be more difficulty attendant on the taking the census, in the way required by the constitution, and which we are obliged to perform, than there will be in the additional trouble of making all the distinctions contemplated in the bill.").

Committee on Style's linguistic changes do not affect the meaning of what was agreed to during the Convention. *Nixon, supra,* 506 U.S. at 231; *Powell v. McCormack*, 395 U.S. 486, 538-39 (1969). It is the drafts of the Committee on Detail that explain what was meant by an "actual enumeration." That meaning is the simple direction that the "number shall . . . be taken in such manner as the said Legislature shall direct." There can be no clearer expression of the fact that the Constitution only commands that the Federal Government determine the number of inhabitants, and leaves virtually complete discretion to the Federal Government to determine how that number would be ascertained.[25] *See Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (the Census Clause gives the Federal Government "virtually unlimited discretion in conducting the decennial 'actual enumeration.'").

IV. THE EARLY IMPLEMENTATION OF THE CENSUS DOES NOT DEMONSTRATE A CONSTITUTIONAL TRADITION REQUIRING DIRECT CENSUS BUREAU CONTACT.

This Court frequently looks to the early implementation of constitutional provisions as an aide to determining the scope of those matters. The history of the

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[25] Of course, this application of the Report of the Committee on Detail is completely different than the use disapproved in *Nixon*. In that case, Judge Nixon wanted to use the work of the Committee on Detail to read out of the Constitution words and concepts that appear in the final text. In contrast, the present use of the Committee on Detail's draft is in full harmony with this Court's precedent: that the Report of the Committee on Detail explains the words of the Constitution where there is a question as to the meaning of the words chosen by Committee on Style. As the Amicus Curiæ demonstrated, the words "actual enumeration" do not in themselves lead to one particular and specific meaning.

early censuses demonstrate that there is a tradition of using unadjusted "headcounts" that rises to constitutional importance. However, a close examination of the statutory story of the census demonstrates that from the beginning Congress was sensitive to the need to, and difficulty in, counting all Americans. The record also shows that, like an estimation, Congress required that certain persons who could not be contacted by an enumerator must be counted. This history also discloses that Congress allowed adjustments to the census lists in an attempt to insure inclusiveness.

The first Census Act, closely following the language and the meaning of the Committee on Detail, simply called for the United States marshals "to cause the number of inhabitants within their respective districts to be taken." Act of March 1, 1790, Ch. 2, § 1, 1 Stat. 101, 101 (1790) (First Census Act). The Act did not specify any methodology for the marshals to follow in gathering the number of inhabitants.[26] In addition, in the first, and subsequent five, censuses, persons were not listed individually, by family, or by any other means.[27] Rather, the number of types of persons per household (generally but not invariably collected by family name) was simply counted. Id. § 1, 1 Stat. at 102. For example, Alexander Hamilton's household contained had two free white male of sixteen years and upward, one free white male under sixteen years, and one free white female. 7 BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE AND

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[26] Later Congress stated that the census should be taken, "by an actual inquiry at every dwelling-house, or of the head of every family within each district, and not otherwise." Act of March 26, 1810, Ch. 17, § 1, 2 Stat. 564, 565 (1810) (Third Census Act).

[27] Only with the 1850 Census were people listed individually. Act of May 23, 1850, Ch. 11, §10, 9 Stat. 428, 430 (1850) (Seventh Census Act).

LABOR, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790, 134 (1908) (FIRST CENSUS). There was no break-out or listing of the individuals counted; persons were simply a tallied number by category. Further, even with such broad recording, only aggregate figures were forwarded to the President for use as part of the final census information. First Census Act, § 3, 1 Stat. at 102. Thus, by the time the figures reached his Cabinet colleague, Secretary of State Thomas Jefferson, who was responsible for the First Census and who simply reprinted the information as he received it from the marshals, MARGO ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 13 (1988), the Hamilton household was simply a part of 8,328 free white males over sixteen years, 5,797 free white males under sixteen years, and 14,963 free white females inhabiting New York City. Thomas Jefferson, Return of the Whole Number of Persons within the Several Districts of the United States 37 (1791), *reprinted in* 9 NATIONAL STATE PAPERS OF THE UNITED STATES, 1789-1817, at 2, 36 (Eileen Carzo ed., 1985).

The First Census Act gave the marshals ample discretion in the method by which they could acquire and report such broad figures. And the marshals apparently took full advantage of this. For example, the marshal in Massachusetts simply lumped together sixty-five of the garrison in the islands of Boston Harbor. 4 FIRST CENSUS 195. Similarly, the marshal in Maryland simply described over 450 people in unincorporated Baltimore County under the headings of "other free people" (probably mainly free Blacks and Indians). 9 FIRST CENSUS 26-35. Clearly, whatever else was transpiring, the First Census did not consist of the kind of head count the Appellees apparently envision.

The reason for this broad and general accounting of people stems in part from the fact that the First Census Act

makes evident that the marshals were not required to contact or have a return from every person they counted. Section 6 of the First Census Act, 1 Stat. at 103, required every person over age sixteen to "give a true account, to the best of his or her knowledge, of all and every person" in a family. More importantly, Section 5 of the First Census Act, *id.*, required that any person "absent at the time of the enumeration" should be counted "as belonging to that place in which he usually resides in the United States."[28] These sections demonstrate that Congress realized that it was not possible for an enumerator to individually contact every person so that they could be counted. If enumerators were limited to those whom they could contact, it would be impossible to count people who were "absent at the time of the enumeration." Yet the statute demonstrates that Congress clearly wanted those persons who could not be contacted to be counted. Other methods must have been, and were expected to be, employed to insure the most complete census number.

Throughout the remainder of the Nineteenth Century, Congress continued to provide for a means of counting those who could not be contacted and to insure that all segments of the population were included in the census count. For example, in the first major revision of the census law, in 1850, Congress instructed the marshals and their assistants to gather information by "visiting every dwelling-house and . . each family in the subdivision assigned to him." Seventh Census Act, § 10, 9 Stat. at 430. However, if there was no one who could provide the necessary census information, the

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[28] This provision was repeated in census acts for the next half century. Act of February 28, 1800, Ch. 12, § 5, 2 Stat.11, 13 (1800); Third Census Act, §5. 2 Stat. at 567; Act of March 13, 1820, Ch. 23, § 5, 3 Stat. 548, 552 (1820); Act of March 23, 1830, Ch. 40, § 5, 4 Stat. 383, 386 (1830); Act of March 3, 1839, Ch. 80, § 5, 5 Stat. 331, 335 (1839).

census-takers were to obtain that information from an agent of the person(s). *Id.* Thus, uncontacted persons were counted in the census.[29]

This standard was broadened further in the next revision of the law, for the tenth census, in 1880, and the ones that followed. These amendments also make three interesting comparisons with the Census Bureau plan under consideration in this case.

First, under the 1880 census methodology, the census-takers were to contact every abode, family, and individual. Act of March 3, 1879, ch. 195, §8, 20 Stat. 473, 475 (1879). Under its present plan, in 2000 the Census Bureau will likewise try to contact every person. However, just as the Census Bureau does not expect to be able to reach all persons in 2000, so Congress did not expect this would be possible in 1880. Thus, in 1880, the law expanded the 1850 technique and allowed the census-takers to gather "the required information, as nearly as may be practicable, from the family or families or person or persons living nearest to such place of abode." *Id.* The sampling techniques proposed by the Census Bureau for the 2000 enumeration seem to fall into this tradition. In essence, it will take required information from those persons situated closest to those who were not reached and use them as a stand-in so that the uncontacted still may be counted. While this may not provide a listing for every individual as was done in the 1880 census, this has no constitutional consequence. As described above, no individual information was gathered, and only aggregate

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[29]This procedure apparently supplanted the prior provision that absent persons would be counted in their usual residence. With an agent of the person to provide the required census information, the prior system became superfluous.

information was used, for the first sixty years of the census.

Second, there is another interesting comparison between the concerns of Congress as reflected in its plan for the 1880 census and the concerns the Census Bureau in its plan for the 2000 Census. The Census Bureau is worried that significant portions of the population in certain areas will be missed unless its plan is implemented. The Forty-Fifth Congress had the same worry. It commanded each supervisor of census to make sure that no "town or village or integral portion of the [census] district has been omitted from enumeration." *Id.*, §5, 20 Stat. at 474. Using modern techniques, the Census Bureau seeks to fulfill the same goal.

Third, Congress was concerned with obtaining the best, most accurate account of the number and distribution of the population. Accordingly, it allowed the supervisors of census to "correct[] his enumeration by striking out or adding the designation of persons improperly enumerated or omitted . . . [and] correct, on such reliable information as he may obtain, all omissions and mistakes in such enumeration. . . ." Act of April 20, 1880, ch. 57, § 3, 21 Stat. 75, 75-76 (1880). Likewise, the Census Bureau plan for the 2000 enumeration would allow the Bureau to correct improperly omitted persons in the count by using reliable population information.

As the foregoing demonstrates, Congress always has been concerned with the very same issues that the Census Bureau seeks to address in its plan for the 2000 census. Congress sought to address those concerns within the limits of the techniques and technologies reasonably available to it at the time. The Census Bureau's 2000 plan is an advance within the constitutional tradition of using more than just a list of directly contacted names to determine the number of

inhabitants of the United States.

In addition, there is no historical evidence or pattern indicating that the particular proposed census methodology, statistical sampling estimation techniques, was expressly prohibited by the Framers. To the extent estimation was used during the Colonial and Confederation periods to determine population, there is no evidence that the Framers sought to repudiate its use in the Federal census. In what is apparently the only statement on this subject in the whole constitutional debate, Caleb Strong, a delegate to the Federal Convention, told the Massachusetts Ratifying Convention that the "mode of census [in the Constitution] is not new." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, 260 (Max Farrand, ed., 1937). Thus, to the extent the Framers used estimations, they are within their constitutional census conception.

In fact, not only did the Framers not mean to freeze the "headcount" method into the Constitution, they repeatedly expressed dissatisfaction with it and its inaccuracy. For example, George Washington wrote that the real numbers of inhabitants in the United States in 1790 was greater than the number found in the First Census because of the difficulties inherent in the methodology that was employed.[30] It is difficult to believe that the Framers set in constitutional

[30] Letter from George Washington to Gouveneur Morris (July 28, 1791), *in* 31 THE WRITINGS OF GEORGE WASHINGTON at 326, 329 (John C. Fitzpatrick ed., 1931). Other of the Founding Fathers expressed the same sentiment. *See, e.g.*, Letter from James Madison to Edward Carrington (Mar. 14, 1790), *in* 13 THE PAPERS OF JAMES MADISON at 103, 105 (Charles Hobson & Robert Rutland, eds., 1981); Letter from Thomas Jefferson to David Humphreys (Aug. 23, 1791), *in* 22 THE PAPERS OF THOMAS JEFFERSON at 61, 62 (Charles Cullen, ed., 1986).

concrete a methodology they so thoroughly criticized.[31]

Over the course of the next 200 years, the science of statistics improved dramatically, but the Government's ability did not keep pace with those developments. When the New Dealers arrived, they found a moribund Census Bureau. It had virtually no professionally trained statisticians and "bureau personnel were completely ignorant of the developments in probability theory that had revolutionized the science of statistics since the turn of the century." THE AMERICAN CENSUS at 173-75. As important, "statisticians had not yet developed either the statistical theory or the practical methodology necessary to evaluate the accuracy of the [statistical] sample." *Id.* at 177. Such information was first established in the 1930s. The first tentative steps toward census statistical sampling were taken in the 1940 census and have been refined ever since. *Id.* at 180-87. After the results of the 1950 census, the Bureau determined that "from the perspective of the total census, more accurate results could probably be achieved in a carefully taken sample than from a complete census." *Id.* at 201. It was also in the 1950 census that the Bureau first started measuring the undercount. *Id.* at 202. By 1987, the Bureau determined that statistical

[31] However, even if there was any discontent with the methods available to the Framers in the Seventeenth and Eighteenth Centuries, these early estimates bear little relation to the sophisticated statistical techniques proposed by the Census Bureau. Indeed, at the time of the Founding, the field was so new that the words "statistics" and "statistical" were not even members of the English language. DANIEL BOORSTIN, THE AMERICANS, THE DEMOCRATIC EXPERIENCE 167 (1973). This is not to say that because the field was so new, in many ways unknown, and lacking in terminology, that the Founding Fathers would reject statistics or that they cannot be encompassed inside the scope of the Census Clause. As demonstrated above, mathematical action was clearly within the Framers' understanding of the words and concepts of an enumeration.

sampling was at the point that it could provide highly accurate aggregate and distributive information. *Wisconsin*, *supra*, 517 U.S. at 10-11 (although the Secretary of Commerce decided not to use statistical techniques in the 1990 census).

This history demonstrates, a continuing effort to get the best, most complete census count consistent with the techniques and technologies of the day. It is also clear that there was no government policy against the use of statistical sampling estimation techniques in our history. Nor was there an unswerving fidelity to a "headcount" method. Rather, for most of its history, the Federal Government simply lacked the capacity, the methods, and the ability to perform such acts. There is no constitutional significance in the fact that the Federal Government did not do something it could not do.

V. CONCLUSION

There is little or no evidence that the Census Clause was meant to either prescribe or proscribe any particular methodology so long as its basic objectives were accomplished. The Amicus Curiæ request that the judgments of the District Courts be reversed.

Respectfully Submitted,

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Nos. 98-404 and 98-564

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Appellants,
v.
UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
Appellees.

On Appeal From the United States District Court For the District of Columbia

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WILLIAM J. CLINTON, ET AL.,
Appellants,
v.
MATTHEW GLAVIN, ET AL.,
Appellees.

On Appeal From the United States District Court For the Eastern District of Virginia

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AMICUS CURIAE BRIEF OF NATIONAL CITIZENS LEGAL NETWORK, U.S. BORDER CONTROL, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, ENGLISH FIRST FOUNDATION, AND POLICY ANALYSIS CENTER IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

Amici curiae, National Citizens Legal Network, a project of Citizens United Foundation, U.S. Border Control, Lincoln Institute for Research and Education, English First Foundation, and Policy Analysis Center, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] Each of the *amici* was separately established in the District of Columbia or the Commonwealth of Virginia within the past twenty years for purposes related to participation in the public policy process. For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, each of the *amici* has conducted research on other issues involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before this Court.[2]

This brief is intended to assist the Court in fully developing the issues in the matters now before this Court. Hopefully, the perspective of nonprofit educational organizations, including

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the various parties, have been received and submitted to the Clerk of Court for filing. *See* Supreme Court Rule 37.3(a).

these *amici curiae*, will assist this Court in obtaining a better understanding of the ramifications of this legal dispute.

The two cases now before this Court concern the authority of the appellants, who include the President and the U.S. Department of Commerce, to use statistical sampling in the next United States decennial census ("the 2000 Census") as a partial substitution for an actual enumeration of the population. These *amici*, particularly because of their interest in the integrity of constitutional processes, are deeply concerned about appellants' plan to substitute statistical sampling techniques for an actual enumeration in the 2000 Census to determine the population of the states for apportionment purposes, believing that appellants' plan would violate not only the Census Act, but the Constitution as well.

SUMMARY OF ARGUMENT

Two three-judge panels of separate United States district courts have concluded, in unanimous opinions, that appellants' proposed use of sampling techniques in the 2000 Census to estimate the population for purposes of apportionment is illegal. Both opinions found that the Census Act (at 13 U.S.C. Sec. 195) proscribes the use of sampling to determine the population for decennial apportionment. The decisions of the courts below are correct and should be affirmed.

The district courts did not find it necessary to reach the question of whether, under the Constitution, Congress may authorize the Secretary to use sampling to determine state populations for purposes of apportionment. If this Court should reach that question, the Constitution (*see* Art. I, Sec. 2, Cl. 3, and Sec. 2 of the Fourteenth Amendment) provides the

clear, unambiguous answer: the census must be an "actual enumeration," and the process must be one of "counting the whole number of persons in each state."

Appellants' invitation to disregard the plain meaning of the Constitution's precise language should be rejected. Review of the historical record supports the fact that "actual enumeration" as used in Art. I, Sec. 2, Cl. 3, was intended to have its plain meaning. The Framers of the Constitution foresaw the concern that would be raised by appellants' census plan: the danger of politically manipulated apportionment. The Framers were aware that an actual enumeration — an actual "headcount" — was necessary to guarantee the representative nature of the lower house of Congress, whose membership would be distributed by state according to population. They wisely mandated a census by actual enumeration, refusing to leave the matter to the discretion of executive officials or legislators.

Current events show that the risk of manipulation is real. Investigations and reports by committees of the 105th Congress underscore concerns regarding the deeply politicized agency which supervises the administration of the census — the Commerce Department. A census by actual enumeration is necessary to preserve public confidence in the integrity of the House of Representatives as well as to guard against the appearance of political corruption.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CENSUS ACT PROHIBITS SAMPLING FOR PURPOSES OF APPORTIONMENT

Three-judge panels of two federal district courts each ruled unanimously that the plain language of Sections 141 and 195 of the Census Act prohibits the Secretary of Commerce from employing sampling methods to determine state population totals for purposes of apportioning seats in the U.S. House of Representatives. *See* United States House of Representatives v. United States Dept. of Commerce, C.A. No. 98-0456 (D.D.C., Aug. 24, 1998) ("House v. Commerce"), J.S. App. 1a-67a (No. 98-404); Glavin v. Clinton, C.A. No. 98-207-A (E.D. Va., Sept. 24, 1998), J.S. App. 1a-22a (No. 98-564). The district courts' holdings should be affirmed.

Although sampling may be used to gather certain information during the decennial census, the Census Act expressly prohibits sampling "for the determination of population for purposes of apportionment of Representatives in Congress among the several States...." 13 U.S.C. Sec. 195. For purposes other than apportionment, Section 195 requires the use of sampling if the Secretary of Commerce "considers it feasible."[3] Section 141 likewise permits, at the Secretary's discretion, the use of sampling procedures and special surveys

[3] Since the requirement to use sampling for nonapportionment purposes hinges upon the Secretary's determination that such sampling is "feasible," Sec. 195 can be said to authorize such sampling at the Secretary's discretion. *See* fn. 6, *infra*, and accompanying text.

as part of the decennial census — although, as the court stated in House v. Commerce, in the case of apportionment, the general authorization gives way to the express prohibition of Sec. 195. J.S. App. at 60a-67a. *See also* opinion of the court in Glavin v. Clinton, J.S. App. at 18a-22a.

Appellants read the first clause of Sec. 195 ("Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States...") as an exception to a "mandatory directive" ("the Secretary shall, if he considers it feasible, authorize [sampling]."). Appellants argue that "[n]o rule of statutory construction suggests...that activities specifically excepted from a mandatory directive are thereby prohibited." Aplt. Brief, pp. 28-29.[4] Citing several examples of what they term the "except/shall formulation," appellants state that the exception from a mandatory directive does not constitute a prohibition in any of them. *Id.*, n. 15. Appellants contend, therefore, that the general permission to sample under Sec. 141 governs, granting the Secretary authority to use sampling for all purposes, including apportionment. *Id.*, p. 29. The effect of the two sections of the statute, according to appellants, is to allow the Secretary to use sampling for apportionment purposes at his discretion.

Under this strained reading of Sec. 195, the exception to the general authorization to use sampling would be wholly negated, since the Secretary could employ sampling both for nonapportionment purposes "if he considers it feasible" and, again at his discretion, for apportionment purposes. Such a

[4] "Aplt. Brief" refers to the brief for appellants filed by the Solicitor General of the United States with this Court in Docket No. 98-404.

reading would render the exception in Section 195 devoid of meaning. Statutes must be read so that every word has some operative effect, so as to avoid "emasculating" a Congressional enactment. *See* Bennett v. Spear, 520 U.S. 154, 117 S.Ct. 1154, 1166 (1997); United States v. Menasche, 348 U.S. 528, 538-39 (1955).[5]

Contrary to appellants' reading of Sec. 195, the second clause of Sec. 195 is not a "mandatory directive." It directs the Secretary of Commerce to authorize the use of sampling "if he considers it feasible." The Secretary therefore has discretion to employ sampling (dependant on whether he considers sampling feasible) "except...for purposes of apportionment." Appellants' analysis of the second clause of Sec. 195 as a "mandatory directive" might have been closer to the plain meaning of the statute if Sec. 195 omitted entirely all references both to feasibility and to the Secretary's judgment (*i.e.*, sampling must be employed in all situations).[6] As it

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[5] Prior to the enactment of the current language of Sec. 195 in 1976, Sec. 195 stated "Except...for apportionment purposes, the Secretary may, where he deems it appropriate [employ sampling]." The 1976 amendment, therefore, at most emphasized the Congressional authorization to use sampling for purposes other than apportionment. As the District Court stated in House v. Commerce, Congress would not have employed such an oblique method to allow sampling for apportionment purposes. *Id.*, p. 67; J.S. App. at 60a-61a. Also, the amendment clarified the exception to the general authority to employ sampling by making it more specific, since after 1976 the exception applied to "apportionment of Representatives in Congress among the several States," and not merely to "apportionment."

[6] Even if considered a mandatory directive, as the District Court for the Eastern District of Virginia pointed out, an exception to a mandatory directive can, and often does, constitute a prohibition of the excepted activity. *See* Glavin v. Clinton, Sl. Op., p. 26.

stands, however, Sec. 195 permits the use of sampling at the Secretary's discretion, except for "the determination of population for purposes of apportionment of Representatives in Congress among the several States."

The Administration's plan therefore violates the Census Act by requiring the illegal use of statistical estimation methods to determine population counts for purposes of apportionment.

II. THE PLAIN LANGUAGE OF THE CONSTITUTION REQUIRES AN ACTUAL ENUMERATION FOR PURPOSES OF APPORTIONMENT

The courts below did not reach the constitutional question. Thus, if this Court affirms the determination of either court regarding the Census Act, resolution of the constitutional question is not necessary. If, however, this Court should reach the constitutional question, the answer is certain: the population of the United States in the decennial census, for purposes of apportionment, must be actually enumerated, not merely estimated.

A. The Constitutional Language Must Be Given Its Normal and Intended Meaning

Art. I, Sec. 2, Cl. 3 of the Constitution requires Congress to enact a law requiring a decennial census be conducted to determine the number of representatives to be elected to the

House of Representatives from each state. Additionally, that Clause, as modified by Sec. 2 of the Fourteenth Amendment, requires that the law enacted by Congress provide for the "actual enumeration" of the American populace by "counting the whole number of persons in each State, excluding Indians not taxed."

Appellants argue that the Constitution does not require an actual headcount of the American people, but merely an estimate of the number of people in each state. Aplt. Brief, pp. 39-49. To support this contention, appellants have ignored key words contained in both Art. I, Sec. 2, Cl. 3, and in Sec. 2 of the Fourteenth Amendment. Aplt. Brief, pp. 40-41. Additionally, they have lifted out of context other words, claiming that the only constitutional requirement is that a census be taken to "further the goal of equal representation for equal numbers of people." *See id.*, p. 46, n. 28.

The language of the relevant constitutional provisions, however, is not susceptible of such a strained interpretation. Because Art. I, Sec. 2, Cl. 3 requires Congress to enact a law providing for a census by "actual enumeration," Congress is not free to legislate to provide for a census count by any method of its own choosing. And because Sec. 2 of the Fourteenth Amendment contains a parallel call for a "counting of the whole number of persons in each State," Congress cannot by law direct a census to count some of the persons in each state and "estimate" the number of those not counted. In short, the plain meaning of the constitutional text denies to both the Congress and the Executive Branch the authority to employ statistical methods to calculate the population of each state for purposes of apportionment.

B. The Plain Meaning Doctrine Governs

From the earliest days of the Republic, this Court has observed the principle that the "words of the constitution are to be taken in their obvious sense." Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 618 (1895). As Chief Justice Marshall stated in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188 (1824), "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Sixty-five years later, Justice Lucius Q. C. Lamar elaborated upon this rule for a unanimous Court. Justice Lamar wrote:

> Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such a case there is the well settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of the framers, and of the people adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous the courts, in giving construction thereto, are not at liberty to search for meaning beyond the instrument. [The Board of County Commissioners v. Rollins, 130 U.S. 662, 670 (1889).]

More recently, this Court applied the plain meaning rule in a case of first impression. Federal District Judge Walter L. Nixon sought review of his conviction by the United States Senate on charges of impeachment, claiming that he had not been given a "judicial trial" before the full Senate, as required by Art. I, Sec. 3 (which provides that "[t]he Senate shall have sole Power to try all Impeachments"). Nixon v. United States, 506 U.S. 224, 229 (1993). This Court refused to accept Mr. Nixon's effort to impose a technical meaning upon the word "try," noting that the dictionary gives it "considerably broader meanings than those to which petitioner would limit it." *Id.* In addition to ascribing a common sense meaning to "try," this Court observed that the Constitution had granted to the Senate the "sole" power to examine impeachment charges. Again, this Court chose the "common sense meaning" of the word "sole," concluding "that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted." *Id.*, 506 U.S. 230-31.

Having followed in the Nixon case "the well established rule that the plain language of the enacted text is the best indicator" of the meaning of a particular constitutional provision, *id.*, 506 U.S. at 232, this Court demonstrated the continuing vitality of the traditional rule that the meaning of a constitutional text is determined by "the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them." The Board of County Commissioners v. Rollins, *supra*, 130 U.S. at 670. As Justice Lamar explained in the Rollins case:

> If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. [*Id.*]

The question here is whether the words used in the Constitution that govern the conduct of the decennial census "convey a definite meaning" and, if so, if that meaning is consistent with or contrary to other parts of the document.

1. The Plain Meaning Doctrine Applies to the Constitutional Text Mandating a Decennial Census

Art. I, Sec. 2, Cl. 3 of the Constitution utilizes ordinary language to describe how the decennial census is to be conducted: "The actual Enumeration shall be made...within every...Term of ten years." Sec. 2 of the Fourteenth Amendment likewise uses ordinary language to describe the means by which the decennial census is to occur: "counting the whole number of persons in each State, excluding Indians not taxed." The operative words, "actual Enumeration" and "counting," are not words of art, nor are they imbued with special historic meaning like "due process of law." Rather, they are practical prescriptions understood by all, directing how the task of numbering the people for apportionment is to be accomplished.

On pages 40 and 41 of their brief, appellants set forth their claim that "the text of the census clause does not require the use of any particular method to determine the populations of the several states." In addressing the meaning of the constitutional language, however, appellants have neglected to

define two key words found in the relevant texts. First, in their attempt to ascertain the meaning of "enumeration," appellants made no effort whatsoever to ascertain the ordinary meaning of the word "actual," even though the constitutional text calls for an "actual enumeration." Second, appellants made absolutely no effort to determine whether the text of Sec. 2 of the Fourteenth Amendment contributes to an understanding of the meaning of "actual enumeration," even though that text explicitly addresses the way that the decennial census is to be conducted, requiring, *inter alia*, the "counting of the whole number of persons in each State."[7]

Had appellants addressed the word "actual," they would have had to concede that the enumeration must be "real," not "virtual" or "potential." At the time of the Convention, "actual" meant "really in act." Samuel Johnson, A Dictionary of the English Language (4th Ed., 1773). Had appellants acknowledged the existence of "counting" in the Fourteenth Amendment, they would have had to admit that the census mandated by the constitution had to be conducted by naming the people "one by one, or by small numbers, for ascertaining the whole," not by estimating the whole "without measuring or

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[7] In their brief supporting appellants in No. 98-564, appellees City of Los Angeles, *et al.*, argue that the "records of the debates" surrounding passage of the Fourteenth Amendment do not support the idea that the Framers of Sec. 2 of that Amendment "were exclusively committed to conducting the census through the use of a head count." L.A. Brief, No. 98-564, p. 6. This argument — which apparently rests on the fact that the primary purpose of Sec. 2 was to adjust apportionment — is not only unpersuasive, it totally ignores the fact that the plain meaning of the Fourteenth Amendment, like the plain meaning of Art. I, Sec. 2, Cl. 3 of the Constitution, requires a head count.

weighing" each component. Noah Webster, American Dictionary of the English Language (1828). Having failed to address these ordinary meanings of "actual" and "counting," appellants' proposed definition of enumeration is fatally flawed.

Compounding this error, appellants sought to define "enumeration" using a modern dictionary as their primary reference. This departs from the practice of this Court to ascertain the meaning of the ordinary language in the Constitution by primary reference to a dictionary in use at the time of the Constitutional Convention. *See* Nixon v. United States, 506 U.S. 224, 229-30 (1993). Had appellants followed this practice, they would have seen that to "enumerate" was "to reckon up singly" or "count over distinctly." Samuel Johnson, *supra*.

The plain meaning of "actual," "enumeration," and "counting" is further confirmed upon examination of the other constitutional provisions which use the same or similar words. The word "actual" appears in two other provisions. According to Art. II, Sec. 2, Cl. 1, the President is commander in chief of a state militia only when it is "called into the **actual**" service of the United States. (Emphasis added.) According to the Fifth Amendment, a member of a state militia is not entitled to the protection of the grand jury indictment guarantee **only** when the militia is "in **actual** service in time of War or public danger." (Emphasis added.) In both instances, this Court has — from the beginning — insisted that these provisions apply only when a state militia has **really entered** into the service of the United States, not just been organized and readied to enter that service. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16-20, 60-64 (1820); Johnson v. Sayre, 158

U.S. 109, 114-15 (1895). As Justice Story stated, it is one thing for the Congress to "call forth the Militia" into the service of the United States; it is quite another to actually enter into that service. Houston, *supra*, 18 U.S. at 64.

The word "enumeration" also appears more than once in the Constitution. The Ninth Amendment states that "[t]he **enumeration** in the Constitution, of certain rights, shall not be constructed to deny or disparage others retained by the people." (Emphasis added.) While the identity of the "unenumerated" rights referred to in this Amendment have been vigorously disputed, there is no debate that the "enumeration" of rights referred to in the Amendment refer to the **actual** rights that are "specifically mentioned" in the constitutional text. *See* Griswold v. Connecticut, 381 U.S. 479, 488-93, 519-27 (1965).[8]

While the word "counting" does not appear elsewhere in the Constitution, the word "counted" appears in the provisions addressing how the votes for President and Vice-President are to be ascertained in the Electoral College. *See* Art. II, Sec. 1, Cl. 3. *See also* the Twelfth Amendment. Can there be any

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[8] Relying on the language of Art. I, Sec. 9, Cl. 4, which states that "[n]o direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken," appellants say that "the Framers understood the word 'enumeration' to be synonymous with 'census of population,' and then claim that the requirement that an "enumeration" be conducted does not dictate the use of any particular methodology in determining the total population of each State." Aplt. Brief, p. 41, n. 23. That contention is wrong, and also ignores the fact that the reference to "census or enumeration" in Art. I, Sec. 9, Cl. 4 expressly refers back to **the** "actual Enumeration" "herein before" required by Art. I, Sec. 2, Cl. 3, not to **an** enumeration generally.

doubt that such votes are to be reckoned one by one and not estimated by some formula (*e.g.*, based upon an estimated "undercount" of votes cast)? Indeed, this Court has stated that "all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted,'" that "[e]very voter's vote is entitled to be counted once," and that"[i]t must be correctly counted and reported." Gray v. Saunders, 372 U.S. 368, 380 (1963).

If "counted," in relation to an elector's vote in the electoral college, means individually computed, then surely "counting the whole number of persons in each State" in the decennial census must mean individually ascertaining that whole number. If "enumeration" in relation to the Constitution means individual specification in the written text, then "enumeration" in relation to the decennial census must likewise require individual treatment. And if "actual" in relation to the state militia's federal service requires proof of entrance into the service in fact, then "actual" in relation to the decennial census must also deal with facts, not estimates.

Only when the Constitution's terms are construed in their "natural signification" does it function harmoniously as a whole. Indeed, by attribution of identical meanings to these words throughout the constitutional text, the "simplest and most obvious interpretation" of the document is embraced — which "is the most likely to be that meant by the people in its adoption." The Board of County Commissioners v. Rollins, *supra*, 130 U.S. at 671.

2. The Plain Meaning Doctrine Limits the Conduct of the Decennial Census

According to Art. I, Sec. 2, Cl. 3, the first "actual Enumeration" of the people and every subsequent enumeration was to be conducted "in such Manner as they (Congress) shall by Law direct." By limiting Congress to prescribe only the "Manner" by which the "actual Enumeration" was to be accomplished, the Constitution limited the power of Congress to enact only such legislation that is designed to provide for an "actual enumeration" of the population. This limitation upon Congressional power has been reinforced by the prescription contained in Sec. 2 of the Fourteenth Amendment that the census "[count] the whole number of persons in each State, excluding Indians not taxed." For, as this Court has ruled recently, the power of the Congress in relation to the substantive provisions of the Fourteenth Amendment is "remedial," limited to the enforcement of those provisions as written. City of Boerne v. Flores, 521 U.S. ___, 138 L.Ed. 2d 624, 636-44 (1997).

Not surprisingly, Congress has invariably provided for actual enumeration of the people, reflecting the plain meaning of the constitutional text. *See* Franklin v. Massachusetts, 505 U.S. 788, 803-06 (1992); United States Dept. of Commerce v. Montana, 503 U.S. 442, 448-56 (1990).

C. The Appellants' Argument Ignoring the Plain Meaning of the Constitutional Text Is Spurious

Appellants ask this Court to disregard the plain meaning of the census provisions of Art. I, Sec. 2, Cl. 3 and Sec. 2 of the Fourteenth Amendment in favor of permitting the decennial

census to be conducted by any means so long as it "furthers the goal of equal representation for equal numbers of people." Aplt. Brief, p. 46, n. 28. In support of this startling proposition, appellants note that the phrase "actual enumeration" was placed in Art. I, Sec. 2, Cl. 3 by the Committee of Style and Arrangement — after the Convention had approved of an earlier version that stated simply that the decennial census "be taken in such manner as the said Legislature shall direct." Because there is no record that the Convention ever considered whether the insertion of "actual enumeration" was calculated to limit such legislative power, appellants have urged that the phrase must not have been designed to impose any limitation on Congress's authority to direct the census however it sees fit, but only "to distinguish the permanent basis for apportioning Representatives from the temporary allocation set forth in the Census Clause." Aplt. Brief, pp. 43-46.

Appellants' argument is clever, but spurious, resting upon the proposition — rejected by this Court — that a constitutional text should be read not according to its final adopted form, but according to an earlier draft. In launching this subterranean attack upon the constitutional text, appellants have misapplied the rules of textual interpretation adopted and followed by this Court.

In footnote 25 on page 44 of their brief, appellants assert that this Court's opinion in Nixon v. United States, *supra*, 506 U.S. at 231, stands for the proposition that words added by the Committee of Style must be construed so as to conform to an earlier draft of the Constitution because "'the Committee of Style had no authority from the Convention to alter the

meaning' of the draft Constitution submitted for its review and revision."

In Nixon, this Court rejected this very proposition. Mr. Nixon claimed that the word "sole" as it appears in Art. I, Sec. 3, Cl. 6 has "no substantive meaning" because "the word is nothing more than a 'cosmetic edit' added by the Committee of Style after the delegates had approved the substance of the Impeachment Trial Clause." This Court rejected Mr. Nixon's approach, relying on the presumption that when the Committee of Style added "sole" to the text, it "captured what the Framers meant in their unadorned language." Further, this Court concluded that the Committee must have done its job because the "Constitutional Convention voted on, and accepted, the Committee of Style's linguistic variation." This Court concluded that "sole" — the word added by that Committee — "was entitled to no less weight than any other word of the text." To have concluded otherwise, the Court observed, would elevate the "second to last draft" of the constitutional text above the final version, which would violate "the well established rule that the plain language of the enacted text is the best indicator of intent." 506 U.S. at 231-32.[9]

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[9] If, as appellants maintain, "actual enumeration" should be disregarded in favor of the earlier draft, then so should the phrase "by Law." Both phrases were added by the Committee of Style, without any record that either was addressed specifically by the full Convention. If the census is to be conducted "in such manner as the **Legislature shall direct**" (emphasis added), then according to appellants' construction of Art. I, Sec. 2, Cl. 3, the 2000 Census must be carried out as Congress directs. As appellants acknowledge (Aplt. Brief, p. 5), in 1997 Congress passed a bill which directed that the census not be conducted by "sampling or any other statistical procedure," only to have the bill vetoed by the President. Without the "by Law" limit imposed on Congress by the existing constitutional text, there would have been no need to present a bill for Presidential approval or veto; if it had exclusive and non-reviewable authority, Congress could have issued a directive (*e.g.*, by joint resolution) expressly prohibiting the Commerce Department from using "sampling or any other statistical procedure" for purposes of apportionment. Thus, under the appellants' construction of Art. I, Sec. 2, Cl. 3, the will of the 105th Congress (as evidenced by the 1997 bill) that there be no sampling for purposes of apportionment in the 2000 Census would be legally and constitutionally binding

Nixon's plain meaning rule does not support appellants' denigration of "actual enumeration" to a merely descriptive, transitional term. *See* Aplt. Brief, p. 45. To the contrary, "actual enumeration" is best understood as a normative term which differentiates between the apportionment of representatives in the first House of Representatives from the apportionment method to be followed thereafter. Further, the term's plain meaning is reinforced by the historical context.

As appellants acknowledge, the initial apportionment of representatives provided for in the Constitution was based, in part, on estimates of future population growth and other non-population factors. Aplt. Brief, p. 45, n. 26. While such an expedient method of apportionment was applied at the beginning, this method was not to be repeated in the future. Instead, within three years after the first meeting of Congress, the Constitution required an "actual enumeration" of the people of each state so that the composition of the House reflected the proportion of the actual population of the states.

Given that the composition of the first House was based upon estimates, to be changed as soon as the constitutionally-required census was conducted, it is clear that the "actual enumeration" language was designed to obtain a census based upon an actual count of actual people, not another estimate. *See* J. Madison, *Notes of Debates in the Federal Convention*, pp. 267-68 (Norton: 1987 ed.) (hereinafter "*Madison's Notes*").

D. Appellants' Version of the Underlying Purposes of Article I, Section 2 Must Give Way to the Plain Meaning of the Constitutional Text

Appellants say that the meaning of "actual enumeration" should be determined by "the purposes underlying Article I, Section 2." In ascertaining those purposes, however, appellants reach beyond the constitutional text, asserting that the "fundamental goal" of the decennial census is to secure "'equal representation for equal numbers of people for the House of Representatives.'" Having extrapolated this singular purpose as the objective of the census, appellants claim that the Constitution should not be read to bar any "census-taking technique..." that "would produce more accurate population figures" than an actual headcount. Aplt. Brief, pp. 46-47.

Appellants' extrapolation is just another example of their disregard for the plain meaning doctrine of this Court. The constitutional purpose of the decennial census is not, as appellants have contended simplistically, to secure "equal representation for equal numbers of people." Rather, as Article I, Section 2 states, the purpose of the census is to ensure that the House of Representatives be chosen "by the people of the several States...according to their respective

Numbers...among the several States." Thus, the goal of the decennial census is to enumerate the actual numbers of residents of each state so that each state would be on an equal footing in relation to its inhabitants. *See Madison's Notes*, pp. 267-68.

To secure this goal, the Convention not only mandated a "periodical census," it dictated a methodology for that census, tying the hands of Congress so "that they could not sacrifice their trust to momentary considerations. *See id.* at 268. The methodology required a permanent standard, a fixed rule not left to the discretion of the legislature.

The purpose of the words "actual enumeration" is to fix the fundamental process of executing the decennial census so that the numbers cannot be manipulated to evade the constitutional objective of equal representation in proportion to the actual residents of each state. When examined in light of the constitutional purpose of the census, an actual enumeration best fulfills that purpose. Whenever government officials depart from the plain meaning of a constitutional text in order to achieve some "higher goal" — as appellants seek to do in this case — then, in the end, "'the Constitution...is in danger of being rendered a mere dead letter....'" The Board of County Commissioners v. Rollins, *supra,* 130 U.S. at 671. The plain meaning rule was fashioned in order to avoid this danger:

> Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation. [*Id.*]

III. THE CONSTITUTIONAL INTEGRITY OF THE REPUBLIC REQUIRES APPORTIONMENT BY AN ACTUAL ENUMERATION OF THE PEOPLE, NOT BY A STATISTICAL ESTIMATE OF THE POPULATION

A. An Actual Enumeration for Apportionment Is Essential to Protect the Representative Nature of the House of Representatives

One of the most extensively debated issues at the Constitutional Convention was how to insure that the House of Representatives achieved an "equitable ratio of representation" between the several states. At first, the debate focused on whether Congress should have discretion to "take a periodical census for the purpose of redressing inequalities in the Representation..." *Madison's Notes*, pp. 266-67, 271-72. Those who favored a constitutional mandate for a periodic census ultimately prevailed, persuading their fellow delegates that it was in "the nature of man...that those who have power in their hands will not give it up while they can retain it." *Id.* at 266. As General Pinckney of South Carolina bluntly said:

> [I]f the revision of the census was left to the discretion of the Legislature, it would never be carried into execution. The rule must be fixed, and the execution of it enforced by the Constitution. *Id.* at 277.

In addition to deciding to mandate a census, Convention delegates further limited Congressional discretion, defining how the census must be taken, including requirements that the census be conducted every ten years and that it be based upon an actual enumeration of people — not an estimate of the

wealth of the people. Again, the delegates were concerned that if Congress were left to its own discretion, "[t]he danger will be revived that the ingenuity of the Legislature may evade or pervert the rule so as to perpetuate the power where it shall be lodged in the first instance." *Id.* at 279. Having so limited the discretion of Congress, the Convention produced a permanent, fixed standard — an absolute rule — of reapportionment. Alexander Hamilton could assure the American people that the House of Representatives would truly be representative of the people, free from "partiality" and "oppression." *The Federalist* No. 36; *see also The Federalist* No. 58.

For over 200 years this absolute rule has served the nation well. Now, however, the current Administration seeks to abandon it. Appellants claim the authority to forego the census's continuous reliance upon an actual headcount of the people in favor of an estimate based upon statistical sampling. They rest their claim upon the contention that their sampling estimate would improve the accuracy of the census. This claim of improved accuracy, in turn, is based upon an estimate that the 1990 census could have been more accurate had it been based upon statistical sampling.

Such claims of enhanced accuracy are suspect for at least two reasons. First, sampling methods clearly are no guarantee of accuracy. Indeed, following the 1990 Census enumeration, then-Secretary of Commerce Robert Mosbacher decided not to use statistical sampling to adjust the 1990 figures — in part because of the widely divergent results caused by even the smallest changes in the assumptions undergirding the statistical models available to him. *Decision of the Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should Be Made, etc.*, 56

Fed. Reg. 33583 (July 15, 1991). Moreover, he observed that the development of a statistical model required essentially arbitrary decisions, which, in turn, would result in significantly different census results. *Id.* at 33600-03.

Second, the discretion inherent in the adoption and development of statistical models offers ample room for the very kind of political manipulation of the apportionment process that the Framers sought to avoid. After all, the constitutional limits upon the conduct of the census were not based upon an absence at that time of sophisticated statistical tools to arrive at an accurate estimate of the population. Rather, they were based upon the unchanging "truth...that all men having power ought to be distrusted to a certain degree." *Madison's Notes, supra*, p. 272.

Convinced of the "political depravity of man," as Madison put it, *id.*, the Constitution's framers were not willing to entrust Congress, despite all of its internal checks and balances, with the kind of discretion that appellants now claim for one man. There is far greater danger of partisan political manipulation when the conduct of the census reposes in a single individual's discretion.

The maintenance of the House of Representatives as the branch of the national legislature proportioned to the actual population of the states, as mandated by the Constitution, is reason enough to deny appellants the discretionary power that inevitably attends a census conducted by statistical sampling.

B. An Actual Enumeration for Apportionment Is Essential to Preserve Public Confidence in the Integrity of the Apportionment Process

In addition to concerns expressed about the integrity of the House of Representatives as a representative body apportioned to the population of the several states, the Constitution's Framers were concerned about ensuring the people's confidence in that body. Already mindful of the western migration of the American people, convention delegate George Mason of Virginia expressed concern that, as new states were added to the Union, they be "treated as equals and subjected to no degrading discriminations." If the people in these new states were deprived of their "equal footing" in the House of Representatives, then, he predicted, they "will either not unite with or will speedily revolt from the Union...." *Madison's Notes, supra*, at 267. Mason's fellow Virginia delegate, Edmund Randolph, echoed this concern, claiming that "[i]f a fair representation of the people be not secure, the injustice of the Government will shake it to its foundations." *Id.* at 268.

Justice Joseph Story reaffirmed the importance of having a House of Representatives which is truly representative of the people. He observed that apportioning membership in that legislative branch on the basis of population "had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other which could be devised." Joseph Story, *Commentaries on the Constitution of the United States*, Section 633 (1833 ed.).

To ensure public trust, the Constitution withheld discretion from Congress as to how or whether to conduct a census, lest

they "sacrifice their trust to momentary considerations." *Madison's Notes, supra*, at 268. In other words, the Framers understood that the people's confidence in the integrity of the new House of Representatives depended upon a census that was not subject to political manipulation. Thus, they provided for an apportionment based upon actual enumeration of the people, rather than some other method susceptible, in the words of Justice Story, to "fraud and evasion."

C. An Actual Enumeration for Apportionment Is Essential in Order to Guard Against the Appearance of Political Manipulation

This year, Deputy Secretary of Commerce Robert L. Mallett remarked to the National Association of Development Organizations that "[t]he Census isn't a trivia collection. **It is the measure we use to distribute political power in the country....**" Regulatory Intelligence Data (April 27, 1998) (emphasis added). The admitted significance of a properly conducted census deserves attention, especially in light of the increasing politicization of the Commerce Department — which will supervise conduct of the 2000 Census.

Investigations conducted by the 105th Congress have reported to the American people concerning the extent of the Commerce Department's politicization. For example, in testimony before the Senate Committee on Governmental Affairs, Richard Sullivan, a former National Finance Director for the Democratic National Committee ("DNC"), addressed the relationship between this national political organization and the Commerce Department under Secretary Brown:

> Ron Brown was an aggressive Commerce Secretary. There was always this criticism that we were getting about, you know, the ties between DNC and Commerce. [Senate Committee on Governmental Affairs, 105th Cong., 2d Sess., Final Report of the Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns, ("Senate Report") "John Huang Moves From Commerce to the DNC," 20 (1998).]

After the 1992 presidential elections, the DNC identified individuals to the Commerce Department as candidates for positions at the Department. For example, John Huang, Principal Deputy Assistant Secretary for International Economic Policy, was hired after the DNC identified him as a "must-consider" candidate for several positions, including Undersecretary for International Trade at the Department of Commerce. *Id.* at 4. Jude Kearney was appointed Deputy Assistant Secretary for Service Industries and Finance after a DNC document identifying him as a candidate for that position was received by the Commerce Department. February 16, 1998 Deposition of Jude Kearney, House Committee on Government Reform and Oversight, p. 6; House Committee on Government Reform and Oversight, Interim Report, 105th Cong., 2d Sess. ("House Report"), "Yah Lin Charlie Trie and His Relationship With the Clinton Administration," p. 15 (1998).

Moreover, Commerce Department personnel have come under serious suspicion of improper pursuit of political objectives in a variety of ways. The Boston Globe reported that "[b]usinesses that gave Democratic Party committees more than $2.3 million...won coveted seats on U.S. trade missions

during President Clinton's first term." (They also secured nearly $5.5 billion in support from the U.S. Overseas Private Investment Corporation ("OPIC")). Hohler, *Trade-trip Firms Netted $5.5 Billion in Aid; Donated $2.3 Million to Democrats*, Boston Globe, March 30, 1997, A1.[10]

Prominent DNC fundraisers were placed on official trade missions. For example:

> Mr. [Howard] Glicken even accompanied the late Commerce Secretary Ron Brown on a 1994 export promotion tour through Latin America. His mere presence troubled some delegation members: Mr. Glicken's 'wheeling and dealing' reportedly 'evoked squeamishness among a number of officials at Commerce.' His inclusion thus raised the specter of political considerations possibly affecting Commerce Department decision-making. [House Report, "FEC Enforcement Practices and the Case against Foreign National Thomas Kramer: Did Prominent DNC Fundraisers Receive Special Treatment?", p. 17.]

In addition, Secretary Brown directly participated in DNC fundraising events. For example, during an official Commerce Department trip to East Asia, Secretary Brown headlined a DNC fundraiser in Hong Kong on October 18, 1995. House

[10] The Globe noted that "one of [Secretary] Brown's top associates, Jeffrey E. Garten, then undersecretary for international trade, served on OPIC's board of directors." An OPIC spokeswoman stated that "agency officials 'may or may not have known' that companies applying for assistance had contributed to Democratic committees or sent executives on missions with Brown." *Id.*

Report, "Yah Lin Charlie Trie and His Relationship With the Clinton Administration," pp. 24-27. Secretary Brown later headlined a DNC fundraiser in Washington, DC on November 8, 1995. *Id.*, pp. 27-29; House Report, "Unprecedented Obstacles to the Committee's Investigation," p. 17.

John Huang, who served as Principal Deputy Assistant Secretary for International Economic Policy from July 1994 to December 1995, engaged in fundraising for Democrats while at Commerce. Senate Report "John Huang at Commerce" 12 (1998). While serving in the Commerce Department, Huang successfully solicited contributions from four donors. *Id.* at 64. Huang was also reportedly involved in organizing a "fund-raising apparatus" for the Democratic National Committee while at Commerce, and in planning a Democratic National Committee fundraiser while at Commerce. *Id.* at 65-67.

According to the Senate Report, Huang had "frequent" contacts with Democratic National Committee finance officials while working at Commerce. *Id.* at 63. "Message slips and long distance calls alone...reveal scores of calls between Huang and DNC officials." *Id.* at 64.

While these reported accounts of the Commerce Department's politicization do not prove that the Census Bureau would engage in political manipulation of Census 2000 figures, it demonstrates the American people would reasonably fear such manipulation could occur. In fact, former Commerce Secretary Mosbacher noted the opportunity for manipulation in his decision **not** to use statistical sampling to adjust 1990 census figures. *See Decision of the Secretary of Commerce*, *supra*, 56 Fed. Reg. 33583, 33585, 33599-603. The potential for abuse of such opportunity would come as no surprise to our

Founding Fathers, who were well aware of "the political depravity of man." *Madison's Notes, supra*, at 272. This awareness led them to establish a constitutional mandate that the basic method of conducting the decennial census for purposes of apportionment would never be entrusted to the discretion of government officials.

CONCLUSION

For the foregoing reasons, *amici curiae* National Citizens Legal Network, U.S. Border Control, Lincoln Institute for Research and Education, English First Foundation, and Policy Analysis Center respectfully submit that the judgment of the courts below should be affirmed.

Respectfully submitted,

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October Term, 1998

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

MATTHEW J. GLAVIN, ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF FOR AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF MATTHEW J. GLAVIN, ET AL.

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INTEREST OF AMICUS CURIAE[1]

Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the Constitution and individual rights. Landmark was established in 1976 and has offices in Kansas City, Missouri and Herndon, Virginia. The case before the Court presents an important separation of powers and statutory construction issue, *i.e.*, whether the executive branch may ignore clear statutory language and legislative history in conducting a decennial census for Congressional apportionment as required by Article I, Sec. 2 of the Constitution and the Census Act, 13 U.S.C. § 1, *et seq.*

ARGUMENT

This is a statutory construction case. There is no Constitutional question requiring the Court's attention in this case as it can easily, and more properly, be dispensed of on statutory grounds. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amicus curiae* and their counsel, made a contribution to the preparation and submission of this brief.

latter.") Congress has spoken precisely to the suitability of statistical sampling by the Commerce Department's Census Bureau and, in plain language, prohibited the use of this methodology to derive the population used for purposes of Congressional apportionment. The Bureau's decision to use statistical sampling to create the 2000 census population for Congressional apportionment purposes in addition to all other purposes is not authorized – indeed, it is flatly prohibited – by the governing statute. The District Court's decision should be affirmed.

THE COMMERCE DEPARTMENT'S STATISTICAL SAMPLING PLAN FOR THE 2000 DECENNIAL CENSUS VIOLATES THE CENSUS ACT.

A. The Statute Clearly Expresses Congress' Intent That Sampling Not Be Used For The Apportionment Census.

In 1957, Congress amended the Census Act to make *limited* allowances for the use of a new method of counting the nation's citizens. *"Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States,* the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 13 U.S.C. § 195. (Emphasis added). The prohibition against sampling for reapportionment is crystal clear.

1. Clear Statutory Language Cannot Properly Be Ignored.

Before granting the Secretary discretion to "authorize the use" of sampling, the statute makes clear that the method may not be used "for the determination of population for purposes of apportionment of Representatives of Congress among the several States." 13 U.S.C. § 195. The "except for" language forbids sampling methodology in collecting numbers for apportionment. The restriction is inseparable from the grant of authority to use sampling in other ways. *See Crosby v. United States,* 506 U.S. 255 (1993).

The instant case is not the first in which the Court has addressed the weight of "except for" language. Section 2 of the Fourteenth Amendment reduces from a State's population count in certain circumstances the number of "male inhabitants" whose right to vote is "abridged" for any reason, *"except for* participation in rebellion, or other crime." U.S. Const. Amend. XIV, sec. 2. In *Richardson v. Ramirez,* 418 U.S. 24, 41 (1974) the Supreme Court confirmed that the "except for" language of Sec. 2 expressly exempts from the sanction of that section disenfranchisement grounded on prior conviction of a felony." In the same way, the "except for" language of § 195 expressly exempts from the general authorization of that section any use of sampling for purposes of Congressional apportionment. Similarly, in *Crosby* the Court interpreted a statute requiring the presence of criminal defendants "except as otherwise provided" as constituting an express limitation on the circumstances where a criminal defendant could permissibly be absent. In light

of the statute's "express use of the limiting phrase . . . the language and structure of the rule could not be more clear." 506 U.S. at 259.

In short, Appellants' view that statistical sampling is authorized for the determination of population for purposes of apportionment directly conflicts with the plain language of the statutory text and renders the "except for" limitation entirely meaningless. *See Brown v. Gardner,* 513 U.S. 115, 121 (1994). The Constitution does *not* vest this sort of power in the Executive Branch. U.S. Const. Art. II.

The Bureau's effort to render meaningless the "except for" provision represents a fundamental intrusion by the Executive Branch on Legislative Branch authority. The invasion is particularly offensive here, because the statutory provisions that the Bureau claims are in conflict are, in truth, entirely consistent. *Bennett v. Spear,* 117 S. Ct. 1154, 1166 (1997) ("It is the cardinal principle of statutory construction . . . that it is our duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section"); *Gade v. National Solid Waste Mgmt. Ass'n,* 505 U.S. 88, 100 (1992); *United States v. Nordic Village, Inc.,* 503 U.S. 30, 36 (1992) (rejecting statutory interpretation that "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"); *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307-08 (1961) ("In these circumstances we will not adopt a strained reading which renders on part [of a statute] a mere redundancy"); *United States v. Menasche,* 348 U.S. 528, 538-39 (1955) (rejecting proposed ruling that "would,

of course, render altogether meaningless a congressional enactment").

2. The Census Act Must Be Read In Its Totality

Appellants assert that 13 U.S.C. § 141 permits the use of sampling in census taking for Congressional apportionment purposes because it lacks an express prohibition against the method. This selective reading of the Census Act is disingenuous and misplaced.

The explicit prohibition is found in § 195, which is the specific provision governing the permissible uses of the sampling method. Of course, these two provisions of the same Act must be read together. *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look at the language and design of the statute as a whole"); *Watt v. Alaska,* 451 U.S. 259, 267 (1981) ("we decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. . . . We must read the statutes to give effect to each if we can do so while preserving their sense and purpose"); *Richards v. United States,* 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act"); *Sutherland Stat. Constr.* § 51.02 at 453 ("Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible"). One would have to be a legal contortionist to read the general authorization for sampling in § 141 as somehow negating the prohibition of sampling for Congressional apportionment in § 195. Again, such a reading would render the specific language

of § 195 meaningless. The Constitutionally appropriate approach – and the common sense approach – is to read the statute so as to give meaning to both provisions.

The only reasonable interpretation of the Act recognizes that § 141 (like the second part of § 195) authorizes the use of sampling for purposes other than Congressional apportionment, while the "except for" provision in § 195 prohibits this methodology for the Constitutionally-prescribed purpose of determining the population for Congressional apportionment. Any other construction of the interplay between § 141 and § 195 would render the "except for" limitation meaningless. *See e.g., Nordic Village, Inc., ibid.*

Sampling in lieu of a head count in the census not only conflicts with the plain prohibition of sampling in § 195, it does not comport with the statuary scheme as a whole. Section 141 governs sampling for popuiation *information*, not apportionment.[2] Section 141 was intended to vest the Secretary with authority to obtain statistics

[2] This interpretation is supported by the fact that § 141 repeats the language of § 193, which permits the Secretary to "make surveys and collect preliminary and supplementary statistics related to the *main topic* of the census as are necessary . . . ." 13 U.S.C. § 193. Since the "main topic" of the decennial census is the enumeration for purposes of apportionment, § 193 authorizes the Secretary to collect supplementary statistical information, ancillary to performing the headcount. Moreover, § 141 is found in Subchapter II of the Census Act, which specifically deals with censuses for purposes other than apportionment.

supplemental to the head count to derive "population *information*" and other census information, such as housing, unemployment, and population characteristics necessary for allocation of federal funding and other purposes other than apportionment.[3] *See Dole v. United Steelworkers of America*, 494 U.S. 26, 36, 110 S. Ct. 929 (1990) (words grouped in a list must be given related meaning); *accord Massachusetts v. Morash*, 490 U.S. 107, 114-115 (1989).

3. Section 195's Specific Sampling Prohibition Takes Precedence Over Section 141's General Provisions.

Established statutory analysis principles require that to the extent that §§ 141 and 195 can not be reconciled (which they clearly can), the "except for" language in § 195 prevails. As between two statutory provisions concerning the same topic, the more specific section governs the general. *Morales v. Trans World Airways, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general"); *HCSC Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam)

[3] The legislative scheme prohibiting sampling for apportionment is also supported by § 141(e)(2), which provides that "information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several states, nor shall such information be used in prescribing Congressional districts." Since sampling is permitted in conducting the mid-decade census, this additional prohibition against the use of data obtained in the mid-decade census confirms the statutory scheme that the Secretary may not use sampling for purposes of apportionment.

("it is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned"); *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982). Accordingly, § 195's *specific* provision governing "sampling" trumps § 141's general grant of authority to the Secretary.

In sum, the only rational and consistent interpretation of the plain language and structure of the Act is that § 195 prohibits sampling for apportionment and § 141 allows it for all other purposes. Particularly when viewed in the context of the statute as a whole, § 141 in no way disturbs the clear and definite prohibition of sampling for purposes of apportionment contained in § 195. As Congress has prohibited sampling for purposes of apportionment, the Bureau has no authority to conduct the decennial census as anything but an actual head-count of the population.

This conclusive reading of the statute's text on its face should end the Court's task. "When the words of a statute are unambiguous, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (*quoting Rubin v. United States*, 449 U.S. 424, 430 (1981); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." (*citing Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)); *see Robinson v. Shell Oil Co.*, ___ U.S. ___, 117 U.S. 843 (1997) ("our inquiry must cease if

the statutory language is unambiguous and the statutory scheme is coherent and consistent").

B. The Legislative History Expresses Congress' Intent That Sampling May Not Be Used For The Apportionment In The House Of Representatives.

1. Section 195 Of The 1957 Census Act Indicates Congress' Intent That Sampling Should Not Be Used In Determining Population For The Purposes Of Apportionment In The House Of Representatives.

An examination of the legislative history of the Act and subsequent Congressional activity provides additional evidence that sampling may not lawfully be used in determining the population for purposes of Congressional apportionment. *See Chevron, USA v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The express prohibition of sampling for apportionment in § 195 of the Census Act, as drafted in 1957 and revised in 1976, demonstrates that Congress intended that the census utilize "actual enumeration" rather than sampling for purposes of Congressional apportionment.

Prior to 1957, the Census Act made no provision for the permissibility of sampling methodology in census taking. In fact, the Act required enumerators to make personal inquiry in every dwelling house and of every family to "obtain every item of information and all particulars required for any census or survey." 13 U.S.C. § 25(c) (1958).

In 1957, prior to § 195's enactment, the Commerce Department sought authority to use sampling in the context of the overall census enumeration to achieve economies of operation. The Commerce Secretary believed that "*some* of the information which is described in connection with a census could be secured efficiently through a sample which is conducted concurrently with the complete enumeration of other items." *See Amendment of Title 13, United States Code, Relating to Census, Hearings of H.R. 7911 Before the House Comm. of Post office and Civil Service*, 85 Cong., 1st Sess. 7-8 (June 19, 1957) (emphasis added). Moreover, the Secretary specifically sought permission to use statistical sampling because he lacked authority to use the method, as it had "generally been held that the term 'census' implied a complete enumeration." *Ibid.*

In 1957 Congress granted the Secretary authority to utilize sampling methods purposes *other than apportionment*. This limited grant of authority confirms Congressional intent that the decennial census must be conducted as an actual enumeration. Statistical sampling could not be used for apportionment purposes. As originally enacted, § 195 stated:

> Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title.

The House Report reflects this exception:

> Section 195 provides that the Secretary of Commerce may authorize the use of the statistical method known as sampling in carrying out the purpose of Title 13, if he deems it appropriate. However, section 195 does not authorize the use of sampling procedures in connection with apportionment of representatives.
>
> The purpose of section 195 in authorizing the use of sampling procedures is to permit the utilization of something less than a complete enumeration, as implied by the word "census," when efficient and accurate coverage may be affected through a sample survey. Accordingly, except with respect to apportionment, the Secretary of Commerce may use sampling procedures when he deems it advantageous to do so.

Thus, there is ample evidence that Congress intended § 195, as originally enacted, to prohibit the use of statistical sampling in apportionment of Representatives.

2. The 1976 Revision Again Reflects Congressional Intent To Exclude The Use Of Sampling In Connection With Apportionment.

Congress revised the Census Act in 1976. Congress again confirmed that the decennial census for apportionment purposes must be based on an actual head count, in accord with the constitutional mandate for an "actual Enumeration." U.S. Const. Art. I, sec. 2. Furthermore, Congress maintained the prohibition against sampling as a method "for the determination of population for purposes of apportionment of Representatives in Congress." It did, however, allow the Secretary to use sampling "where feasible" instead of "where appropriate."

The Conference Report of the revisions again confirmed that the revised § 195 authorized the Secretary to

use sampling procedures "if feasible, *except in the apportionment of the U.S. House of Representatives.*" Conference Report on H.R. 11337, 94 Cong.Rec. 33132 (Sept. 28, 1976) (emphasis added). The Senate Report also clearly indicated Congressional intent to exclude sampling methods in determining apportionment in the House. S.Rep. 94-1256, at 6, reprinted in 1976 U.S.C.C.A.N.[4]

C. Legislative History Of Section 141 Does Not Support A Contention That Section 141 Authorizes The Use Of Statistical Sampling For Congressional Apportionment.

The legislative history of § 141, which was added to the Census Act in the 1976 revision, provides no indication that Congress intended the provision to authorize the Secretary to utilize statistical sampling for Congressional apportionment. There is simply no basis upon which to read § 141 in the manner Appellants propose.

The principal purpose of the 1976 revisions was merely to authorize a mid-decennial census to "maximize

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[4] One district court has erroneously suggested that the revision of § 195 to say that the Secretary "shall" use sampling when feasible, rather that "may" use such sampling authorizes the Secretary to use sampling for Congressional apportionment. *City of Philadelphia v. Klutznick*, 503 F.Supp. 663, 679 (E.D. Pa. 1980). Amending the second clause of § 195 from permissive language to mandatory language in no way affects the fact that first part of § 195 contains an explicit exception for Congressional apportionment. The fact that Congress sought to encourage sampling "except for" Congressional apportionment does not suggest that it was authorizing (or requiring) sampling for Congressional apportionment.

equality and distribution of Federal [funding allocation] formulas." Conference Report, H.R. 11337, mid-decade Census; 94 Cong. Rec. H35171-35174 (daily ed. Oct. 1, 1976) (statement of R. Schroeder). Indeed, § 141(e)(2) prohibits the use of information gathered in the mid-decennial census, which may be conducted by sampling, for apportionment or redistricting. Title 13, § 141(e)(2), of the United States Code provides that information "obtained in any mid-decade census shall not be used for apportionment of representative in Congress among the several states, nor shall such information be used in prescribing congressional districts." 13 U.S.C. § 141(e)(2). Section 141 clearly is designed to facilitate administrative functions rather than displace § 195's prohibition against sampling for Congressional apportionment.

D. In 1980 Congress Rejected Legislation That Would Have Required The Census Bureau To Utilize Statistical Sampling.

In 1980 Congress again rejected legislation that would "require the bureau of the Census to adjust the population figures, employing the best available methodology to correct for undercounting for all purposes, including reapportionment." S3063, 96th Cong., 2nd Sess. (1980), 96 Cong. Rec. at S22856 (daily ed. Aug. 25, 1980).

The 1980 legislation seeking to grant sampling authority certainly would not have been proposed had the Commerce Department been thought already to have such authority. In fact, the Congressional Research Service in 1980, after an extensive analysis of the text and

legislative history of those amendments, specifically concluded that the Department *did not* have such authority. *See The Decennial Census: An Analysis and Review, Report to the Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs*, 81-88 (Comm. Print).

Accordingly, Congress' refusal to pass such legislation demonstrates that it did not want to grant the Department authority to use sampling for the apportionment count.[5] *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 220 (1983) ("While we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected.") *See United States v. Riverside*, 474 U.S. 121, 137 (1985) ("a refusal by Congress to overrule [a particular] construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983) ("Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced in an interpretation of the law").

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[5] Sheldon T. Bradshaw, Note, *Death, Taxes and Census Litigation: Do Equal Protection and Apportionment Clauses Guarantee a Constitutional Right to Census Accuracy?* 64 Geo. Wash. L.Rev. 379, 407 (1996) ("The Text of § 195 and its legislative history are clear – sampling is not allowed for the purpose of apportioning the House of Representatives").

E. Appellants' Proposed "Compromise" Reading Of Sections 141 and 195 Is Contrary To The Law.

Appellants suggest that § 141's delegation to the Secretary of unfettered discretion to use "statistical sampling" and other methods of determining population "in such form and content as he may determine" clearly does not grant the Secretary such authority with respect to Congressional apportionment. Rather, §§ 141 and 195 "taken together" allow sampling only "as long as it is not a substitute for traditional methods of enumeration." *See City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114, 1125 (2d Cir. 1994), *Young v. Klutznick*, 497 F.Supp. 1318 (E.D. Mich. 1980) *rev'd*, 652 F.2d 617, 625 (6th Cir. 1981).

This proposed "compromise" interpretation of § 141 of the Census Act, limiting the Secretary's discretion to use sampling only in addition to a traditional enumeration, is at odds with the statutory language. In fact, if Appellants' interpretation is adopted, this "compromise" eviscerates § 195's prohibition. The Census Act either authorizes sampling for purposes of Congressional apportionment or it does not. There is no language in the statute that suggests that the Secretary may or shall conduct sampling, but only if it is preceded by, or in conjunction with, a traditional enumeration. There is certainly no requirement that the Secretary's sampling for purposes other than Congressional apportionment must be in addition to an actual "head count". There is no construction of § 141, or the interplay between §§ 141 and 195, that authorizes sampling for Congressional apportionment

only in certain limited circumstances, but simultaneously grants the Secretary unfettered authority to use sampling for other purposes.

Moreover, the "limitation" the Appellants seek to impose on the statute's language is, upon examination, no limitation at all. Appellants contend that apportionment sampling may not be used as a "substitute for traditional methods of enumeration." But the Secretary's plan means that he may use sampling only to add to the population figure derived from the traditional head count for the 2000 census for individuals he cannot find to count. This is precisely the conduct § 195 prohibits.

Under this method, Appellants will not only use sampling to estimate the additional "missing" population that the Department is unaware of, but also to estimate the population of households the Department is aware of, for the final 10 percent of the population not responding to the Census questionnaire. Thus, the Department has chosen to use a statistical sample to estimate the 10 percent of those people not responding to their questionnaires "in lieu of" a head count of those individuals.

It is apparent then, that even if the Department is authorized to supplement population totals derived throughout the traditional method of enumeration, the Department's plan still violates the statute because the final 10 percent is derived through a statistical sampling. This sampling method is utilized as a "substitute for" the traditional method of a head count. While the Department here has chosen to enumerate a 90 percent subset of the known population, it may, under its interpretation for

the statute, just as permissibly enumerate 80 percent, or 50 percent, or 30 percent of the population, and statistically estimate the remainder. In any of these circumstances, Appellants are not using sampling as a complete "substitute for traditional methods of enumeration," but as a supplement to traditional methodology, *i.e.*, head counting. Thus, in reality, Appellants' claim that statutory authority permits sampling in addition to a traditional enumeration is no different than claiming statutory authority exists permitting sampling as the *sole* basis for determining the population for Congressional apportionment purposes. Accordingly, it also is no less prohibited by § 195.

CONCLUSION

The plain language and legislative history of §§ 195 and 141 of the Census Act do not, in any fashion, authorize the use of statistical sampling to any degree in Congressional apportionment. Section 195's clear language specifically prohibits the use of sampling for apportionment. Moreover, its legislative history is replete with examples of Congress' specific intent to exclude the use of sampling for apportionment purposes. Similarly, § 141 and its legislative history fail to indicate any intent on the part of Congress to grant the Department the authority to ignore the specific language of § 195. Finally, any "compromise" reading of § 195 and § 141 proposed by Appellants runs contrary to the express intent of Congress with regards to the authorization of statistical sampling. The

District Court's decision below is correctly decided and should be affirmed.

Respectfully submitted,

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October Term, 1998

WILLIAM JEFFERSON CLINTON, ET AL.,

Appellants,

v.

MATTHEW GLAVIN, ET AL.,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Virginia

BRIEF OF THE AMICUS CURIAE CITY OF OMAHA, NEBRASKA IN SUPPORT OF PLAINTIFF-APPELLEES GLAVIN, ET AL.

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INTEREST OF THE AMICUS CURIAE CITY OF OMAHA, NEBRASKA

The City of Omaha, Nebraska, submits this amicus curiae brief in support of the position of the plaintiff-appellees Matthew Glavin, et al. (hereinafter "plaintiffs"). The City of Omaha agrees that the statistical sampling method proposed for use in the 2000 census violates applicable statutes. As a municipality that would be directly and materially affected by an unlawful census, the City of Omaha particularly supports the plaintiffs' standing to bring the present action. The City of Omaha presents its perspective on the real and imminent injury that the proposed sampling methods pose to the county plaintiffs and similarly situated local government entities.

SUMMARY OF ARGUMENT

Plaintiffs have sufficiently pled and proven their standing to bring the present action, a challenge to the use of statistical sampling in the 2000 census. First of all, Congress has effectively removed any prudential limitations on the exercise of federal jurisdiction as to this specific type of action.

The remaining question is whether this action meets the three requirements for a justiciable "case" or "controversy" under Article III of the U.S. Constitution. To meet these tests a plaintiff must show that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

The plaintiffs submitted expert testimony establishing that the statistical sampling will result in vote dilution of the individual plaintiffs. The plaintiffs' evidence also shows that the county plaintiffs will experience a relative decrease in federal funding. Such programs as the Community Development Block Grant program, the Emergency Shelter Grant program, and the Home Investment Partnerships program are allocated to local governments in sums that are largely determined by population figures according to the census. Thus, the county plaintiffs, and other local governmental entities such as the City of Omaha, will be adversely affected by the illegal use of statistical sampling in the 2000 census.

The failure to conduct a timely and legal census in the year 2000 will also injure all local governments that depend so fundamentally upon the census. Common examples of problems include census-based state funding to localities, and state and local government election districts that are redistricted based upon the census. The lack of a lawful census in the year 2000 will cause infinite political and legal chaos among local and state governments.

The only remedy for the above problems is injunctive relief prohibiting the statistical sampling methods; in other words, an order such as that which was specifically authorized by Congress, and which was in fact ordered by the district court in the present action.

The order of the district court should be affirmed in its entirety.

ARGUMENT

PLAINTIFFS HAVE STANDING TO BRING THIS LAWSUIT.

The City of Omaha supports the district court's finding that the applicable tests for standing have been met by the plaintiffs, particularly the political subdivision plaintiffs. The plaintiffs Cobb County, Georgia, Delaware County, Pennsylvania, and DuPage County, Illinois, ("county plaintiffs") are specifically injured by the use of statistical sampling in the 2000 census.

The question of standing involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As will be noted below, the prudential prong of this test has been easily met by virtue of a specific act of Congress. The plaintiffs, particularly the county plaintiffs, also allege and establish injury that is sufficient to meet the constitutional prong of the test. In this analysis, it is important to note that for purposes of ruling on a motion to dismiss for want of standing, both trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. *Id.* at 501.

A. Prudential Limitations.

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction. *Allen v. Wright*, 468 U.S. 737, 751 (1984). However, in a given case countervailing considerations such as specific constitutional or statutory provisions can outweigh prudential concerns, and thus imply a right of action in the

plaintiff. See *Warth*, 422 U.S. at 500-501. Thus, prudential limitations "can be modified or abrogated by Congress." *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 1161 (1997).

In this way, Congress has effectively abrogated any prudential concerns in this case. Congress has provided that "[a]ny person aggrieved by the use of any statistical method in violation of the Constitution or any provision of law . . . may in a civil action obtain declaratory, injunctive, and any other appropriate relief against the use of such method." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1998, Public Law No. 105-119, 111 Stat. 2440, Section 209(b) (hereinafter "1998 Appropriations Act").

That category of "[a]ny person aggrieved" by an unlawful census is indeed huge, and is sufficient to dispel any prudential concerns in the present case. This statutory "aggrieved person" test effectively removes any prudential considerations, short of actual constitutional limits on standing. As can be seen in the next section, the plaintiffs are indeed aggrieved persons with constitutional standing.

B. Constitutional Cases or Controversies.

In *Bennett v. Spear*, this Court restated the three requirements for a justiciable "case" or "controversy" under Article III of the U.S. Constitution:

> [A] plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of

> the defendant, and that the injury will likely be redressed by a favorable decision.

Id., 117 S. Ct. at 1161.

The plaintiffs allege several types of injuries that meet these tests. As was noted above, for present purposes such allegations must be accepted as true, and construed in favor of the plaintiffs. *Warth*, 422 U.S. at 501. Furthermore, plaintiffs' affidavit evidence supports this standing. See, *id.*, at 501-502; affidavit of Dr. Ronald E. Weber (hereinafter "Weber affidavit").

1. Vote Dilution.

As further detailed by the district court memorandum opinion (J.S. App. 11a) and by the plaintiffs' briefing, the individual defendants are directly injured by virtue of vote dilution. Using the 1992 post-enumeration survey, the Weber affidavit shows how the statistical sampling method will result in a shift of population away from areas inhabited by the individual plaintiffs. (J.A. 65-70). The resulting redistricting changes would dilute their votes. *Id.* Voters have sufficient standing in such circumstances of vote dilution. See, *e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962). Accordingly, the individual plaintiffs, as voters, have standing.

The City of Omaha wishes to focus on two other aspects of injury that particularly affect the county plaintiffs and the City of Omaha itself: the loss of federal funds, and the dislocation caused by the failure to conduct a lawful census in a timely manner. The county plaintiffs are particularly impacted by these injuries.

2. Loss of Federal Funds.

An unlawful census will have a common financial impact on the county plaintiffs, the City of Omaha, and similarly situated local governmental agencies across the nation. Although the plaintiffs' standing must survive or fail on the plaintiffs' own merits, it bears noting that the broad inclusive language of Section 209(b) of the 1998 Appropriations Act appears to encourage enforcement by "private attorneys general", as a similar legislative provision was characterized in *Bennett*, 117 S. Ct. at 1162 (describing a "statutory scheme to rely on private litigation to ensure compliance" with legislation).

One ground for injury in the present case is the loss of federal funds to the county plaintiffs. This injury is real and imminent, is fairly traceable to the unlawful sampling, and is remediable.

Specific examples show how the statistical sampling will harm local governments such as the county plaintiffs and the City of Omaha. The Community Development Block Grant ("CDBG") program is one of the larger and more well known of the federally funded programs. Federal CDBG funds are provided to local governments for a variety of community improvement purposes. The broad statutory purposes include the elimination of slums and detrimental conditions in existing neighborhoods and residential areas, 42 U.S.C. § 5301(c)(1) and (2); the conservation and expansion of housing, particularly for those of low and moderate income, 42 U.S.C. § 5301(c)(3); economic development of physically or economically distressed areas, 42 U.S.C. § 5301(c)(8); and expansion and improvement of community services, 42 U.S.C.

§ 5301(c)(4). At least 70 percent of the CDBG funds provided to local governments must be used to support activities that benefit persons of low or moderate income. 42 U.S.C. § 5301(c).

Another example is the Emergency Shelter Grant program. Under this program, federal funds are provided to local governments, to facilitate "emergency shelter for homeless individuals." 42 U.S.C. § 11374. This includes funding of homeless shelters and the various service providers that serve the homeless. *Id.*

The Home Investment Partnerships program provides local governments with funding for low or moderate income housing. Again, depending on the particular program, 90 to 100 percent of such funds must go to the benefit of low or moderate income families. 42 U.S.C. § 12744. The funds are to be used for affordable housing opportunities, special needs housing, rental assistance, barrier removal, and other housing-related activities. 42 U.S.C. § 12742.

Of particular relevance to this case are the formulas for calculating federal fund allocations to specific local governments under these programs. The formula for the national allocation of CDBG funds is found at 42 U.S.C. § 5306(b). Under the formula for metropolitan cities, one direct factor in the calculation is either (a) the ratio between "the population of that city and the population of all metropolitan areas," or (b) the ratio between "the extent of growth lag in that city and the extent of growth lag in all metropolitan cities." 42 U.S.C. § 5306(b)(1). 42 U.S.C. § 5306(b)(2) states a similar formula for urban

counties. With respect to the population comparison factor, 42 U.S.C. § 5302(a)(8) further defines "population" as "total resident population based on data compiled by the United States Bureau of the Census and referable to the same point or period in time." Similarly, with respect to the growth lag comparison factor, the term "extent of growth lag" also incorporates the definitional term "population." See, 42 U.S.C. § 5302(a)(12). Thus, under either possibility, CDBG fund allocations are based on population as determined by the Census Bureau.

The Emergency Shelter Grant program is allocated and paid out in similar fashion. The formula for allocations to local governments is found in 42 U.S.C. § 11373. The latter section provides, quite simply, that the percentage of allocation is to be equal to the percentage of allocation determined for the CDBG funding under § 5306. Thus, the CDBG formula is used for this program as well. So again, census results are determinative of the funding for this program, just as they are for the funding of CDBG programs.

Allocations under the Home Investment Partnerships program also depend upon population counts, and thus upon the census. 42 U.S.C. § 12747(b) provides that the formula for the national allocation of these funds is to be set by federal regulation. That allocation is apparently set forth at 24 C.F.R. § 92.50. Subsection (c) of the latter regulation lists six factors to be factored into the formula. One of those factors is "population of a jurisdiction multiplied by a net per capita income (PCI)."

In summary, all of these example programs provide for the appropriation of a finite sum of federal funds.

That finite sum is divided into specific finite sum allocations to local governments and other entities. In each example, the size of the allocation depends on the population served by the relevant local government. Thus, a local government's finite allocation sum might arbitrarily increase or decrease, depending on the census method.

The simple mathematical result on the bottom line is that if a locality's percentage of the national population is decreased, its relative share of federal funding under these programs will also decrease.

This is exactly what has happened to the county plaintiffs. The Weber affidavit details the relative decrease in federal funding that would be incurred by Delaware County and DuPage County. J.A. 70-71. The Weber affidavit proves this loss of federal funding, or at least provides a factual showing sufficient to survive a standing challenge. See, *Warth*, 422 U.S. at 501-502.

The Weber affidavit speaks in terms of real dollars lost by the county plaintiffs. It specifically ties those losses to the use of the statistical sampling method now being employed by the Census Bureau. Thus, the plaintiff counties have suffered an "injury in fact," which is fairly traceable to the statistical sampling being implemented. See, *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 510 U.S. 1176 (1994) (city had standing to challenge a census methodology that would result in the loss of federal funds to the city); *Wisconsin v. City of New York*, 517 U.S. 1 (1996) (challenge, by states, cities, and other plaintiffs, of census method was heard and rejected on the merits).

It should also be noted that the plaintiffs' allegations and evidence on the record – particularly including the Weber affidavit – distinguish these plaintiffs from the unsuccessful plaintiffs in *National Law Center on Homelessness and Poverty v. Kantor*, 91 F.3d 178 (D.C. Cir. 1996). As noted above, in the present case the county plaintiffs have alleged, and on at least a preliminary basis, have shown, how they have been injured by the unlawful census procedures. While the plaintiff cities in *National Law Center* failed to prove their damages in opposing a motion for summary judgment, the county plaintiffs in the present case survive any standing objections via the evidence presented, including the Weber affidavit.

The federally funded programs discussed above demonstrate that an unlawful census method affects more than the apportionment of congressional representatives. When Congress and federal agencies set the rules for the federal grant programs described above, they incorporated the use of an assumedly lawful census method. They presumed that the Census Bureau would use a lawful method – *i.e.*, an actual head count – and they based fund allocations upon that presumption. The Census Bureau now for the first time will deviate from that presumed method, and will deviate from applicable sections of the U.S. Constitution and federal statutes.

3. Failure to Perform a Legal Census in a Timely Manner.

Another significant area of injury is the severe dislocation to be caused by the failure to conduct a lawful census in the year 2000. The evils engendered by the

failure to conduct a lawful census include the misallocation of funds at the state and local levels, and the incorrect division of voting districts at state and local levels.

Examples of experiences at the local level demonstrate these injuries. In Nebraska, it is possible to locate at least 19 statutory or constitutional sections that base funding or voting representation upon federal census figures. Several types of state funded aid to municipalities are based on census population figures. See, *e.g.*, Neb. Rev. Stat. § 77-27,137.01 (Reissue 1996) (state aid to municipalities); Neb. Rev. Stat. § 39-2517 (Reissue 1993) (state funding to municipalities for streets); Neb. Rev. Stat. § 18-2603(3) (Reissue 1997) (funding through the municipal infrastructure redevelopment fund).

Census population figures are also the basis for the apportionment of numerous voting districts at the state and local levels in Nebraska. For example, Neb. Rev. Stat. § 32-553 (1996 Cum. Supp.) requires that Omaha's city council districts "be substantially equal in population as determined by the most recent federal decennial census." The section adds that new district boundaries are to be drawn within six months after legislative districts are redrawn pursuant to new census figures. The failure to conduct a lawful 2000 census would call into question the makeup of Omaha's city council. Indeed, with the makeup of the council called into question, the validity of city council actions and legislation would be questionable. Such political and legal chaos injures the City of Omaha and its citizens.

The census results serve as a crucial measuring stick for most of the representative civic institutions that affect

our lives at the state and local level. The aforementioned Neb. Rev. Stat. § 32-553 applies to the governing board of "any political subdivision except a public power district." Other examples in Nebraska abound. State legislature districts are to be redrawn after each federal census. Nebraska Constitution Article III, Section 5. So are Nebraska Supreme Court judicial districts. Nebraska Constitution Article V, Section 5. Other examples of census-based redistricting can be found at Nebraska Constitution Article VII, Section 10 (University of Nebraska Board of Regents); Neb. Rev. Stat. § 32-552 (1996 Cum. Supp.) (school board districts); Neb. Rev. Stat. § 32-504 (1996 Cum. Supp.) (boundaries of congressional districts); and Neb. Rev. Stat. § 70-604 (Reissue 1996) (public power district redistricting).

Similar statutes can be found in the states in which the county plaintiffs are located, namely, Illinois, Pennsylvania, and Georgia. See, *e.g.*, 55 Ill. Comp. Stat. Ann. 5/2-3001 and 3003 (West 1993) (county board districts to be equal in population, as defined by the census); 53 Pa. Cons. Stat. Ann. § 903 (West 1997) (district reapportionment of governing bodies of local government, pursuant to the census); Ga. Code Ann. § 36-35-4.1 (1998 Supp.) (election districts of municipal governing authorities may be reapportioned pursuant to the census).

The legal and political significance of the federal census is woven throughout the fabric of state and local governments. The failure to conduct a lawful 2000 census disrupts the elective and financial processes of state and local governments, and deprives constituent citizens of their rights to fair and representative government.

All of these injuries are remediable now. Section 209(b) of the 1998 Appropriations Act paves the way for a judicial prohibition against the sampling method, specifically allowing a plaintiff in such a case to "obtain declaratory, injunctive, and any other appropriate relief against the use of such method." A final and binding court order against the use of that method, as was entered by the district court (J.S. App. 23a), effectively precludes the defendants from using those specific methods that have been alleged and shown to cause the plaintiffs the particular injuries at issue.

CONCLUSION

The City of Omaha joins with the plaintiffs in praying that the judgment of the district court be affirmed in its entirety.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

MATTHEW J. GLAVIN, ET AL.

On Direct Appeal From The United States District Courts For The District Of Columbia And The Eastern District Of Virginia

REPLY BRIEF OF CALIFORNIA LEGISLATURE, ET AL.

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ARGUMENT

I. Plaintiffs' Arguments Against Statistical Sampling Are Based on False Assumptions

The arguments against the use of statistical sampling to provide a more accurate census in the year 2000 are riddled with false assumptions and red herrings:

1. Plaintiffs rely heavily on characterizing the traditional census methods as an actual count of the population and characterizing the use of statistical sampling as an estimate of the population. Brief for the United States House of Representatives ("House Br.") at 11, 33, 45, 47; Brief of Appellees, Matthew J. Glavin, et al. ("Glavin Br.") at 1-2, 42-43, 49, 50. Traditional methods, however, themselves produce only an estimate of the population, and a grievously flawed estimate at that. Statistical sampling is at least as much a method of actual counting as the self-enumeration by mail that has been accepted practice since the 1970s, the centuries old practice of relying upon a neighbor's sense of how many people live next door or down the street, or the decades old practice of imputing the number of residents who cannot be located based upon the characteristics of a nearby residence.

2. Plaintiffs invoke "the way the census has been conducted for 200 years" (House Br. at 24; *see also* Glavin Br. at 36) and a supposed "rule against statistical sampling that has governed the census process throughout our nation's history." House Br. at 8-9; *see also id.* at 31-32, 34-35. There is, however, no "way the census has been conducted" over the past 200 years. To the contrary, census procedures have changed dramatically over the years to accommodate changing conditions and take

advantage of improved techniques and technologies. *See* U.S. Department of Commerce, Bureau of the Census, *Report to Congress – The Plan for Census 2000* (August 1997) (*"Census 2000 Report"*), Joint App. 46-47; National Research Council, *Modernizing the U.S. Census*, National Academy Press, Washington D.C. (1995) at 19-21, 228-38; Declaration of Margo J. Anderson, Joint App. 343-46, 351-52. Statistical sampling did not even exist until the 20th century. Anderson Declaration, Joint App. 343, 347; Declaration of Stephen Elliott Fienberg, Joint App. 377-78. Nothing in the Constitution addresses statistical sampling, and Congress did not address the issue of sampling until 1957. Statistical sampling as contemplated for the 2000 census is a new and refined method of counting the population even as compared to the procedures proposed for the 1990 census. *See Census 2000 Report*, Joint App. 93 ("The methodology has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country."). This case is not about estimating population based upon records of white male inhabitants set out in militia returns or polling lists, such as was done in some regions before the founding of the Republic. House Br. at 47 n.65. It is not about the "conjectural" and prospective population figures used for the first apportionment. Glavin Br. at 47-48. Equating statistical sampling with such techniques is a distortion of history and mathematics. *See* Brief on the Merits of the California Legislature, et al., in Case No. 98-404 ("California Brief") at 37-39.

3. Plaintiffs raise the specter of the Census Bureau adding "imagined people" and subtracting other presumably real "people" from the population count based upon statistical sampling. House Br. at 4; *see also* Glavin Br. at 49. People accounted for by statistical sampling are not imaginary simply because they did not receive a census form, did not return one, or were not physically located by a census field worker. To the contrary, it is the uncorrected traditional methods – methods that mistakenly count deceased people, double count people who fill out a census form at both their primary residence and their vacation home or who move during the critical census period, and count people who have never existed – that result in the inclusion of non-existent people. *See* Fienberg Declaration, Joint App. 357-58; *see also Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996).

4. In a similar vein, the House implies that a physical count will be eschewed in favor of a sample census and that a sample of 750,000 households that does not reflect demographic variations in different areas will be projected over the entire nation and across state lines. House Br. at 4. This is not the case. The census planned for the year 2000 includes efforts at a full physical count that make the most of traditional methods. *See Census 2000 Report*, Joint App. at 58-67, 73-80.[1] It includes an effort to reach every household in the nation by mail and

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[1] The procedures planned for Census 2000 are explained in the Fienberg Declaration, Joint App. 361-68. They are also set forth in further detail in the U.S. Department of Commerce, Bureau of the Census, report entitled, *Census 2000 Operational Plan* (April 1998), Joint App. 148-340.

to count all inhabitants by the mailout/mailback technique. *Id.* at 61. It also includes extensive door-to-door follow-up and outreach campaigns. *Id.* at 58-61, 69-71, 77-79. The statistical adjustments at issue here are designed to supplement the physical count in order to account for those who are not found through this effort and to correct for the double counting that is known to occur. *Census 2000 Report*, Joint App. 41-45, 87-98. The samples for the statistical adjustment will be taken "from all areas of the country, with all race and ethnic groups, from all sizes of towns and cities, and from rural areas," in order to assure an improved distributive count among the states. *Census 2000 Report*, Joint App. 93.[2] "Because this sample is very large, and drawn separately for each state, it will provide reliable population numbers for every state and Congressional district." *Id.*

This is by no means a sample census, and the Court need not reach the question of whether a census based on sampling in lieu of a physical count would be a reasonable exercise of the Secretary's discretion. Rather, the question here is whether statistical sampling may be used to supplement a physical count and correct errors that traditional methods are known to produce.[3] As Professor

[2] *See also id.* at 87 (samples for the Postal Vacancy check), 88 (samples for non-response follow-up).

[3] The limited nature of the statistical adjustment at issue here permits the Court, were it so inclined, to go no further than to hold that the Census Act and Constitution allow the use of statistical sampling as a supplement to more traditional measuring tools rather than in lieu of the traditional methods. *See Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, *Young v. Baldrige*, 455 U.S. 989 (1982).

Choldin has noted, the agency decision to do the type of statistical corrections at issue here is "a decision that would have been considered technical in a quieter time." Harvey Choldin, *Looking for the Last Percent: The Controversy Over Census Undercounts* (1994) at 5.

II. Plaintiffs' Statutory Arguments Are Ill-Founded

Plaintiffs advance a rule of statutory interpretation that offers no deference whatever to agency construction of the statute that it is entrusted to administer. The House disposes of this Court's extensive precedent calling for such deference in a cursory footnote. House Br. at 26-27 n.36. The Glavin plaintiffs ignore the *Chevron* doctrine altogether.

As we argue in our Brief on the Merits, the deference commanded by this Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, applies in full force here and calls for ratification of the Census Bureau and Department of Commerce interpretation of the statute to permit statistical correction of the census. California Brief at 12-30. The cases upon which the House relies are not to the contrary. *See* House Br. at 26-27 n.36. Thus, *National Wildlife Fed'n v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997), supports the proposition that any agency interpretation, even in the midst of litigation, that reflects fair and considered judgment concerning the meaning of the statute, is entitled to deference. 127 F.3d at 1129. *Miller v. Johnson*, 515 U.S. 900 (1995), simply

stands for the proposition that the Court "retains an independent obligation in adjudicating consequent equal protection challenges" in light of an agency interpretation. 515 U.S. at 922. Similarly, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), holds that when the agency did not take into account constitutional considerations in interpreting an ambiguous statute, the Court will. 458 U.S. at 577. Neither of these factors pertains here or weighs against the deference to which the interpretation of the Commerce Department is due.[4]

The House further suggests that congressional alteration of a statutory prohibition requires more than an express statutory authorization and more than amendment of the language of the provision in question. House Br. at 10, 29-33, 40. Instead, the House argues, the words in the prohibitory clause must themselves be altered, and the congressional record must explicitly include statements of intent and guidelines for the exercise of the authority granted. *Id.* at 10, 33, 37-38. No legal precedent demands such additional indicia of congressional intent, particularly when, as here, the added language explicitly authorizing use of sampling in the decennial census was totally unnecessary if plaintiffs' interpretation prevails.[5]

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[4] *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which the House also cites (House Br. at 27 n.36) involved the state's authority vis-a-vis the federal government to set age limits for state court judges; it has nothing to do with agency interpretation of a statute or the question of *Chevron* deference at issue here.

[5] Plaintiffs argue that if Congress intended to repeal a pre-existing prohibition on sampling, the legislative history of the 1976 amendments would have reflected a clear and manifest intention to do so. House Br. at 38-39; Glavin Br. at 30. Significantly, none of the cases plaintiffs cite involved a situation where Congress simultaneously expressed its intent on the face of the statute, as Congress did here in section 141(a), and amended the very statutory provision in which the prohibition was contained in a manner that eliminated any inconsistency, as Congress did here in section 195. There is no requirement that, in addition to expressing its intent in the text of a statute, Congress must reiterate that intent in legislative history. Indeed, "congressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985). Thus, in *Chisom v. Roemer*, 501 U.S. 380, 396 (1991), which the House cites, this Court noted that if Congress had intended to change the law, "Congress would have made it explicit in the statute. . . ." That is precisely what Congress did here.

This argument by the House, and the Glavin plaintiffs' statutory argument, which amounts to a rewrite of the statute and deletion of section 141(a) (*see* Glavin Br. at 28-29, 33, 39-40), are fully answered in our Brief on the Merits.[6] *See* California Brief at 21-22.

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[6] The Glavin plaintiffs' further argument that section 195 "can only be understood as vesting the Secretary with discretion to sample" (Glavin Br. at 37) would render meaningless the 1976 change in section 195 from "the Secretary may, where he deems it appropriate . . . " to "the Secretary shall, if he considers it feasible . . . ," and it would make section 141(a) surplusage. None of the cases that the Glavin plaintiffs cite in support of this contention involves a statutory scheme comparable to the one here. *See, e.g., Anderson v. Edwards*, 514 U.S. 143, 154 (1995); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 (1981). *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986), not only fails to support plaintiffs, it applied the *Chevron* doctrine to hold that the Court must defer to the agency's construction of the scope of its authority. 476 U.S. at 980-81. That is exactly what should happen here, as well.

Despite plaintiffs' repeated claim that amendment of the Census Act in 1976 to authorize the use of sampling for apportionment purposes would constitute a "momentous change" that surely would have been accompanied by heated debate (*See* House Br. at 37, 32-33, 43; Glavin Br. at 31), all indications are that this matter was neither momentous nor controversial.[7] Multiple Census Bureau reports from 1970 through 1976 expressly and without apology noted the importance of sampling to add 1.5 million people in the 1970 count and provide a more accurate census. At the same time that Congress was considering the 1976 amendments to the Census Act, the GAO submitted a report to the House Committee on Post Office and Civil Service, the same committee that reported on the 1976 amendments. Comptroller General

[7] The fact that issues of statistical sampling have all our attention now does not mean they were momentous then. Thus, the House's assertion that the 1957 enactment of section 195 was accompanied by "protracted legislative debate" (House Br. at 37 n.50) is simply wrong. In the 1957 enactments, as in the 1976 amendments, section 195 received little comment and was not highlighted in the statement of legislative purposes. *See Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service*, 85th Cong., 1st Sess. 4, 7, 8-9 (1957). The assertion that in 1976 Congress was "captivated" by the possible effects of sampling on reapportionment and districting (House Br. at 43) is a distortion of the record. The Census Act's prohibition against use of a mid-decade census for reapportionment (13 U.S.C. § 141(e)(2)) does not signal congressional disapproval of sampling; to the contrary, it reflects Congress' desire to "avoid[ ] the confusion to the public of constantly changing representative districts." H. Rep. No. 94-944, 94th Cong., 2nd. Sess. 18 (1976) (supplemental views on H.R. 11337).

of the United States, *Programs to Reduce the Decennial Census Undercount, Department of Commerce: Report to the House Committee on Post Office and Civil Service*, GAO Rep. No. GGD-76-72 (May 5, 1976). That 1976 GAO report again delineated the use of sampling in the 1970 census. *Id.* at 21-22. Neither the reporting agencies nor any member of Congress at the time expressed any criticism of the 1970 census sampling procedures.[8] Instead, Congress accepted the 1970 Census, used it for reapportionment, and enacted the 1976 amendments to the Census Act which, while devoted in large part to the mid-decade census, also added explicit language to section 141(a) authorizing the use of sampling in the decennial census and modified section 195 in a manner consistent with that change.[9]

[8] Plaintiffs fail to acknowledge or respond to this sequence of events and the complete absence of contemporaneous disapproval. Compare California Brief at 16-19 with House Br. at 43 and Glavin Br. at 30-31. Instead they recite statements made in the 1980s in the midst of litigation over whether the 1980 census would be statistically adjusted (Glavin Br. at 31 n.32), and rely on selective excerpts from legal memoranda analyzing the statute and ultimately concluding that it does not bar statistical sampling to correct the census. House Br. at 31 n.42 and 37-38 n.51. Plaintiffs also noticeably fail to address the fact that a unanimous Congress apparently saw no legal bar to sampling in 1991, when it directed a study by the National Academy of Sciences on the "means by which the Government could achieve the most accurate population count possible," including "the appropriateness of using sampling methods." Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, §§ 2(a)(1) and 2(b)(1)(C), 105 Stat. 635 (1991).

[9] Plaintiffs cite cases for the proposition that "[s]eemingly broad general grants of authority are commonly subject to specific limitations found elsewhere in a statute" as a reason to

That the legislative history attached to the 1976 amendments did not focus on this aspect of the change in law is neither surprising nor determinative. Depending upon what was in the minds of the members of Congress, statements in the legislative history that the new language was added to section 141(a) "to encourage the use of sampling and surveys in the taking of the decennial census,"[10] can support either side in this litigation. Thus, here, as in other situations in which the courts have invoked *Chevron* deference, the legislative history is of little help in casting light on the meaning of the statutory

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disregard the plain language of section 141(a). House Br. at 29; *see also* Glavin Br. at 28 and n.28. In the cases on which plaintiffs rely, the broad grant of authority did not expressly address the specific agency activity in question, and the specific limitation propounded was not ambiguous. *See United States v. Giordano*, 416 U.S. 505, 512-14 (1974); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), which the Glavin plaintiffs cite, involved three provisions of the Federal Communications Act: a grant of FCC authority to regulate "interstate and foreign . . . communication," an express denial of "jurisdiction with respect to . . . intrastate communication service," and an ambiguous provision that addressed depreciation. 476 U.S. at 360, 362 (47 U.S.C. §§ 151, 152(b), 220). In holding that the Act did not preempt states' regulation of depreciation rates, this Court found that the section expressly addressing depreciation was not "so unambiguous or straightforward as to override the command of § 152(b)." 476 U.S. at 377. Applying that rationale to the instant situation supports a holding that section 195 of the Census Act is not "so unambiguous or straightforward as to override" the express authorization of section 141(a).

[10] S. Rep. No. 94-1256, 94th Cong., 2nd Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466.

language. *See, e.g., Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 412 n.10 (1993).

Nor is the absence of statutory guidelines for the agency's determination whether to use sampling in any given census something that should give the Court pause. *Cf.* House Br. at 33; Glavin Br. at 34. The census is by its very nature an enormous, complex, and technical endeavor that demands frequent judgment calls and policy determinations by the Census Bureau and the Secretary of Commerce. *See Modernizing the U.S. Census, supra,* at 19; *see generally Census 2000 Report,* Joint App. 34-147, and *Census 2000 Operational Plan,* Joint App. 148-340; *see also Wisconsin v. City of New York*, 517 U.S. at 23 ("Our deference [to the Secretary's determination] arises not from the highly technical nature of his decision, but rather from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary."). Congress has rarely interposed itself into the methods by which the census will be accomplished and has been content to rely upon the Census Bureau, the Secretary of Commerce, the array of experts including the National Academy of Sciences on whom the Census Bureau relies, and regular reports to the congressional oversight committee. The statutory latitude afforded the decision whether to use statistical sampling to improve the census is no different from the discretion that the agency has long been given over other and equally significant aspects of the census.

The theoretical possibility that the agency will exercise its discretion unreasonably or in a manner that is inconsistent with the Constitution is no reason to deny it the discretion in the first place. Thus, any suggestion that

the Census Act must be interpreted to deny the agency discretion because it might use sampling in a manner that undercuts accuracy and the constitutional goal of equal apportionment set out in Article I, section 2 of the Constitution is without merit. As we discuss in our Brief on the Merits at 30-40, the Constitution does not forbid the use of statistical sampling as a method of counting, and, hence, the Court does not face a situation in which any statutory authorization of sampling would be unconstitutional. *Cf. Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (mere fact that a colorable constitutional argument against the interpretation of a statute may be advanced does not command an alternative interpretation.) Indeed, to the extent that constitutional concerns bear on the issue of statutory interpretation, they support an interpretation that permits statistical correction when, as here, such correction is highly reliable and is necessary to achieve a census that will permit equal apportionment.

In *Wisconsin v. City of New York*, this Court carefully examined whether the agency's decision not to use sampling in the 1990 census was a reasonable one, and upheld it on the grounds that the factors present at that time justified the agency's decision. Specifically, the Court, and the Secretary of Commerce before it, was concerned that use of statistical sampling would sacrifice distributive accuracy for the sake of overall accuracy. *Wisconsin v. City of New York*, 517 U.S. at 18, 20, 22. That is no longer the case. Fienberg Declaration, Joint App. 371-73; *Census 2000 Report*, Joint App. 87-98. For the 2000 census, we know that traditional methods standing alone will result in an increasingly debased census count and that the statistical sampling techniques now available will

improve the accuracy of the census at every level. "At all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44.[11] In these circumstances, a decision not to make the statistical adjustment is arguably both unreasonable and inconsistent with the Constitution. *See Wisconsin v. City of New York*, 517 U.S. at 15, quoting *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (Plaintiffs challenging census decision have the "burden of proving that a decision contrary to that made by the Secretary would 'make representation . . . more equal.' ").

III. Plaintiffs' Constitutional Arguments Misrepresent the History and Meaning of Article I, Section 2

The House incorporates into the constitutional phrase "actual enumeration" a requirement that the

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[11] The Glavin plaintiffs attempt to create the false impression that the use of sampling will result in a less accurate census. Glavin Br. at 1, 3, 7, 41-42. All that the 1997 GAO report on which plaintiffs rely suggests is that attempts at in the field follow-up with 100% of the households that do not respond to mail questionnaires plus adjustment by statistical sampling would likely be more accurate than in the field follow-up with 90% of the non-responding households plus non-response sampling and adjustment by statistical sampling. General Accounting Office Report, GAO/GGD-97-142, *Progress Made on Design, but Risks Remain* (July 1997) at 26. By contrast, the failure to use statistical sampling which plaintiffs advocate will surely result in a less accurate census no matter how much effort is devoted to in the field follow-up. *Census 2000 Report*, Joint App. 54 (quoting National Academy of Sciences' Panel on Requirements); *see also id.* at 42, 49-52, 99, 106-07.

government count "one by one" only by discounting extant dictionary definitions from the 18th century that support the defendants' and intervenors' contention that an enumeration is a count or an accounting; instead, the House emphasizes alternative, noncontrolling definitions that include the concept of counting "singly" or "each separately." *Compare* House Br. at 1, 45-46 with House Br. at 46 nn.63 and 64; *see also* California Brief at 32-33. The Glavin plaintiffs achieve the same result by simply omitting contemporaneous definitions that are inconsistent with their argument. *Compare* Glavin Br. at 44-45 with California Br. at 32-33. Established census procedures such as census by mail, self-enumeration, imputation, and hearsay information would all be inconsistent with the interpretation of the constitutional language that plaintiffs propose. As we discuss in our Brief on the Merits, the constitutional language is entirely consistent with the statistical corrections contemplated here, and the constitutional purpose of equal apportionment demands such correction. California Br. at 30-40.

The history of article I, section 2 is likewise consistent with discretionary use of statistical sampling to correct the census count. The House suggests that the Founding Fathers intended to prohibit the use of statistical sampling in order to avoid political manipulation of the census. House Br. at 11, 48. This theory reads into the Constitutional Convention of 1787 matters that were never there. The political manipulation that the framers feared was twofold. First was the concern that unless Congress was constitutionally required to reapportion it would refuse to do so and lock in the relative political power of the northern and eastern states. *See, e.g., The*

Records of the Federal Convention of 1787, vol. 1 (Max Farrand, ed., rev. ed. 1937) at 533-34, 540-41, 558-61, 578-80, 583-86. Second was the concern that if timing and a population formula were not constitutionally fixed, then future congresses would revisit and alter the compromise whereby slaves would be counted only as 3/5 of a person. *Id.* at 592-96. The fixed and objective constitutional standard that the framers adopted to resolve these concerns was that the census be based upon population, include the whole number of some persons and exclude or only partially count others, and occur every 10 years. U.S. Const., art. I, § 2, cl. 3. The framers expressly left the method of counting to the discretion of the Congress. *Id.*[12]

Plaintiffs' asserted fear of political manipulation ignores the incontrovertible fact that the method of statistical sampling contemplated for the 2000 census would be established *before* the count was taken and so would not create any substantial opportunity for political manipulation. *Census 2000 Report*, Joint App. 132. Moreover, whether or not the statistical adjustment procedures are set in advance, they present no more opportunity for manipulation, and in many respects less opportunity, than other more conventional aspects of the census. *See*

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[12] Put another way, article I, section 2 commands that Congress determine every 10 years how many individuals reside in the nation and in each of the several states. A physical enumeration is designed to answer this question but does so with considerable error. The combined physical enumeration and statistical adjustment at issue here answers the very same question and does so with greater accuracy.

Choldin, *supra*, at 162, 236; *Census 2000 Report*, Joint App. 42-44.[13]

Amici Washington Legal Foundation expresses concern that persons interested in maximizing the political power of their neighborhood or state will manipulate the mail back procedures and lie to field workers. Brief of Washington Legal Foundation, et al. at 27-28. That risk, which is inherent in the traditional census methods as well, would actually be mitigated by the ability to send a limited number of highly qualified, well trained field workers into the sample area. *See Census 2000 Report*, Joint App. 89. Indeed, the dearth of qualified field workers is one reason why a 2000 census based exclusively on traditional methods, without the benefit of statistical sampling, will result in unreliable and incomplete information. *Census 2000 Report*, Joint App. 99-100.

[13] For example, the funds budgeted for the census are a critical determinant in how much follow-up to the mail campaign can be achieved and what sort of outreach efforts are possible, with significant consequences for how many and what type of people will be counted or excluded. Similarly, the Census Bureau's plans in each stage – from compiling address lists, to hiring field workers, to partnerships with local governmental and non-governmental organizations – all are subject to partisan manipulation. Leaving such matters, including the question of whether to do statistical correction, to the agency serves to protect against rather than encourage political manipulation.

CONCLUSION

For their own reasons, plaintiffs are satisfied with and seek a 2000 census that will seriously undercount African Americans, Hispanics, Asian Americans and Pacific Islanders, renters and children. The Legislature of the State of California, which faces using the census figures for redistricting and having them used for the distribution of federal funds, is not satisfied with such a census. The California Legislature supports the Census Bureau's carefully developed plan to use statistical sampling to correct the census undercount. Neither the Constitution nor the Census Act erects a barrier to that effort.

The judgments below should, therefore, be reversed.

Dated: November 16, 1998

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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WILLIAM J. CLINTON, *et al.*,
Appellants,

v.

MATTHEW GLAVIN, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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REPLY BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

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REPLY BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

I. STATISTICAL SAMPLING WILL PRODUCE THE MOST ACCURATE AND COST-EFFECTIVE CENSUS EVER TAKEN.

The House, Glavin-Appellees (collectively "Plaintiff-Appellees"), and several amici argue that statistical sampling will make the 2000 census less accurate than it would be otherwise. They are wrong. The only evidence introduced on the subject shows that using statistical sampling in the 2000 census will produce the most accurate and cost-effective census ever.

A. Using Statistical Sampling Increases the Accuracy of Non-Response Follow-Up.

The Glavin-Appellees announce — incorrectly — that "it is undisputed" that sampling for non-response follow-up ("NRFU") "decreases accuracy," Brief of Appellees, Matthew J. Glavin, *et al.* ("Glavin Br.") at 3 (emphasis omitted), and that "it is undisputed" that sampling during the NRFU "is less accurate than a traditional enumeration would be." *Id.* at 7. Not so.[1]

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[1] The Glavin-Appellees are fully aware that this factual issue is disputed, and their contrary claim misrepresents the record. After they made this same erroneous contention during argument to the district court, they were corrected. *See* City of Los Angeles, *et al.*, Intervenors' Supplemental Brief on Census Accuracy, Wedding Dresses, and "Actual Enumeration" at 2-5. In reality, the Glavin-Appellees had not contended this issue was

Statisticians and other census experts agree that using statistical sampling in the NRFU will increase the accuracy of the 2000 census. The National Academy of Sciences' Panel on Alternative Methodologies, the National Academy of Sciences' Panel on Requirements, the American Sociological Association, and the Government Accounting Office all support the use of sampling to improve accuracy. Joint Appendix in No. 98-404 ("House J.A.") at 53, 84 (*The United States Department of Commerce Bureau of Census, Report to Congress — The Plan for Census 2000* (revised and reissued August 1997) ("*Census 2000*")). As the National Academy of Sciences' Panel on Alternative Methodologies concluded:

> [W]e do not believe that a Census of acceptable accuracy and cost is possible without the use of sampling procedures, both for the [NRFU] and the integrated coverage measurement....

Id. at 89-90.

Using statistical sampling in the NRFU increases its accuracy in at least three ways. First, the object of the census is to determine how many people live in each area as of a single day: April 1, also known as the "decennial census date." 13 U.S.C. § 141(a). Because people constantly move from one area to another, the farther away in

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"undisputed" when they moved for summary judgment, but instead had themselves failed to dispute this fact: "[s]tatistical sampling will produce the most accurate and cost-effective census ever." City of Los Angeles, *et al.*, Statement of Genuine Issues Concerning "Material Facts" Included in Plaintiffs' "Statement of Undisputed Material Facts" at 19.

time from the census date the NRFU contact occurs, the more likely it is to be erroneous. Indeed, for this reason the NRFU was the "Achilles' heel of the 1990 Census." House J.A. at 362 (Declaration of Stephen Fienberg ("Fienberg Decl.") ¶ 12). "The further from the April 1 Census Day that data was collected, the more data quality declined and errors increased." *Id.* The NRFU planned for the 2000 census requires enumerators to visit fewer non-responding households. Thus, it will "reduce the time span over which the follow-up is conducted, reducing errors caused by a dynamic U.S. population." *Id.* at 363 (Fienberg Decl. ¶ 15).

Second, the more quickly the NRFU can be completed, the sooner the ICM can begin. "The longer the delay between Census Day and the ICM, the more respondents are likely to provide inconsistent responses (out of forgetfulness, or because of the continuous turnover in housing units — which affects approximately 150,000 housing units each month)." *Id.* at 89 (*Census 2000*).

Third, the Census Bureau will save about $400 million by not having to contact 10% of the non-responding households. *Id.* at 107-108 (*Census 2000*). It will use these savings to hire more qualified enumerators and provide them with better training. *Id.* at 89. Armed with better enumerators, the Census Bureau will obtain more accurate data and achieve greater accuracy. *Id.* at 363 (Fienberg Decl. ¶ 15).

Thus, the Glavin-Appellees' complaint that statistical sampling in the NRFU is "being done only to save time and money," Glavin Br. at 42, overlooks the fact that saving time and money will increase census accuracy. *See also id.*

at 378-379 (Fienberg Decl. ¶ 44) (rebutting Glavin-Appellees' contention that their position is supported by the GAO).

B. Post-Enumeration Adjustments Using Integrated Coverage Measurement ("ICM") Will Produce More Accurate Final Numbers.

1. ICM Is an Improved Method of Post-Enumeration Adjustment.

The ICM will correct for the error in the initial count of the population made through the mail campaign, door-to-door follow-up, and the NRFU sampling. House J.A. at 92-98 (*Census 2000*), 364-65 (Fienberg Decl. ¶ 17). To estimate the undercount, the ICM will employ dual system estimation ("DSE"). *Id.* at 96-98 (*Census 2000*). DSE is a well accepted, commonly used procedure. *Id.* at 365 (Fienberg Decl. ¶ 18). The Court is familiar with it already. *See Wisconsin v. City of New York*, 517 U.S. 1, 8-10 (1996). DSE has been employed in the past two censuses to evaluate data quality and has undergone substantial review and improvement by the Census Bureau, with extensive input from panels at the National Academy of Sciences and experts in statistical methods. House J.A. at 365-368 (Fienberg Decl. ¶¶ 21-23).

During the ICM, the Census Bureau will randomly select a nationwide probability sample of 25,000 blocks (or approximately 750,000 housing units). *Id.* at 94. Using specially-trained enumerators, the Census Bureau will count the households and household members in the sample blocks. *Id.* at 95. Then, for each of the 25,000 sampled blocks, the Census Bureau will use DSE to compare the results of the first count of the population (through the mail campaign and

the NRFU) with the results of the second count of the population (the ICM) for each of the sampled blocks. *Id.* at 96-98 (*Census 2000*), 366-77 (Fienberg Decl. ¶ 21). Through this process, the Census Bureau will determine which households and household members were erroneously included or excluded in the first numbers. *Id.* In the end, the ICM will produce a set of improved, *i.e.*, more accurate, counts for the 25,000 blocks that will then be applied to every block in the nation. *Id.*

In addition, the Census Bureau's use of DSE in the ICM phase is sophisticated enough to account for differential undercount rates, *i.e.*, those rates that differ based on certain demographic and geographic qualities of different blocks. One would not expect the DSE estimate of the net undercount rate for a block in the heart of Washington, D.C., for example, to explain or reflect the net undercount in Langley, Virginia. Accordingly, in selecting the ICM sample, the Census Bureau starts with a list of all the blocks (or equivalent-size rural units) in the United States, then groups blocks into categories (or "strata") according to both geography and demographics, such as racial composition, proportion of homeowners to renters, and average household size. *Id.* at 94-96 (*Census 2000*), 372 (Fienberg Decl. ¶ 34). The undercount for each stratum is determined by measuring the undercount of a sample of blocks within the stratum by DSE. *Id.* The undercount rate of these blocks is then applied to the other blocks in that stratum. *Id.* The final step in the ICM consists of correcting the raw census count for each stratum to take into account estimated omissions and erroneous additions to that stratum. *Id.*

2. The Plaintiff-Appellees' Attacks on the ICM Are Unfounded.

The House claims that because of the ICM, "hundreds of thousands of people will be deleted from the census totals, and millions of imagined people who were never identified will be added." Brief for the United States House of Representatives ("House Br.") at 4. The House has it backwards. The ICM was developed precisely because traditional methods of enumeration have resulted for decades in tens of millions of people being erroneously added and omitted. House J.A. at 375-77 (Fienberg Decl. ¶¶ 39, 41). The 1990 Census, for example, *erroneously added 11 million persons* and *erroneously omitted 15 million persons*. *Id.* The ICM will rectify these errors. Absence of the ICM will insure that millions of Americans — especially children, renters, minorities, and the poor — will go uncounted.

The Glavin-Appellees also question the ICM's accuracy. They note that the ICM is based upon the 1990 Post-Enumeration Survey ("PES"), and that the Secretary ultimately decided not to use the PES to adjust the 1990 census results. Glavin Br. at 4. They disparage the ICM because the initial 1990 PES estimated undercount projection had to be revised downward from 2.1% to 1.6%. *Id.*

This argument is very misleading. First, the 1990 PES successfully captured a large percentage of the undercounted populations. *See* House J.A. at 367 (Fienberg Decl. ¶ 22); *see also* B. Edmonston and C. Schultze, eds., *Modernizing the U.S. Census*, Panel on Census Requirements in the Year 2000 and Beyond, Committee on National Statistics, National Research Council (National Academy Press, 1995); D. Steffey and N. Bradburn, eds., *Counting People*

in the Information Age, Panel to Evaluate Alternative Census Methods, Committee on National Statistics, National Research Council (National Academy Press, 1994).

Second, the revision to the 1990 PES resulted, in large part, from a computer error that had nothing to do with the soundness of the method.[2] Computer errors, of course, are not reserved for statistical sampling, but can occur in other more traditional census processes.

Third, major improvements will make the ICM more accurate than the 1990 PES. Most important, the sample size of the ICM will be *five times* as large as it was in the 1990 PES.[3] This significantly larger sample size "is large enough, and sufficiently representative, to estimate population totals for each state," thus ensuring greater accuracy. *Id.* at 94 (*Census 2000*). Another important difference is that in the 1990 PES, the strata *crossed* state lines, while in the 2000 Census ICM, separate strata will be established *within* each state. In addition, the use of "strata" for each state, not used in 1990, is also expected to produce greater accuracy in the ICM. *Id.* at 373 (Fienberg Decl. ¶ 35).

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[2] U.S. Dept. of Commerce, Bureau of Census, *Report of the Committee on Adjustment of Postcensal Estimates* 15 (Aug. 7, 1992) (attached as Exhibit E of Memorandum in Support of Motion of the City of Los Angeles, *et al.* to Intervene as Defendants (Apr. 3, 1998)).

[3] The 1990 PES gathered survey information from the inhabitants of approximately 5,000 blocks across the nation and the occupants of 150,000 households nationwide. The ICM, by contrast, will select 25,000 blocks and ultimately obtain information from the occupants of 750,000 housing units. House J.A. at 94 (*Census 2000*).

The Glavin-Appellees also wrongly assert that the ICM process is flawed because the Census Bureau has already "assumed" in determining the ICM post-strata blocks that some racial groups are "just as likely" to be counted as others. Glavin Br. at 49. This is wrong for several reasons. First, the strata that the Census Bureau will use have not yet been determined. *See* House J.A. at 92-98 (*Census 2000*). Second, the strata will group persons according to many characteristics, including, for example, age, location, proportion of homeowners to renters, and average household size — not just race. *Id.* at 94 (*Census 2000*), 372 (Fienberg Decl. ¶ 34). Finally, from a more technical standpoint, the Census Bureau is *not* assuming that certain persons have the same undercount rate as other persons, but rather that the undercount rates for different groups *are closer to one another than either is to the national net undercount*.[4]

C. The ICM Must Be Used for Such Purposes as Redistricting and Allocation of Federal Funds, Even if It Cannot be Used for Apportionment

Amici National Republican Legislators Association, *et al.* ("NRLA") claim it would be improper to use statistically adjusted census data for *redistricting* purposes because

[4] Apparently concerned that the post-strata might mix different ethnic or religious groups with each other, Glavin-Appellees worry that the Census Bureau is grouping "white Park Avenue socialites" with "Arabs and Hasidic Jews." Glavin Br. at 49, n.49. As explained above, however, this grouping may be proper since, for example, these groups may share similar demographic and geographic traits. House J.A. at 379 (Fienberg Decl. ¶ 46).

of the error rates. *See* NRLA Brief at 24-27. Citing block-level error rates from the 1995 test conducted by the Census Bureau, it concludes — without analysis — that "[i]f the lowest level data are suspect, equal population local representation districts cannot be drawn from this data." *Id.* at 26. Although these suits only challenge the use of sampling for *reapportionment*, not redistricting, NRLA's wrongheaded argument warrants a brief response.

The block-level error rate does not have any bearing on the accuracy of the census figures used for drawing congressional districts. House J.A. at 126-27 (*Census 2000*). "Calculations of average error for small blocks can be misleading to those unfamiliar with these statistics." *Id.* at 127; *see id.* at 123-126 (detailing why it is wrong to rely on block-level error rates). Thus, the error rate, if any, that is relevant to address the NRLA's concern for accuracy should be the error rate at the congressional district-level. If sampling is used, the Census Bureau estimates that average error rate will be only 0.6 percent, compared to an average error rate of 1.9% without sampling. *Id.* at 122 (*Census 2000*), 375-376 (Fienberg Decl. ¶ 40).

Although NRLA does not appear to understand statistical analysis, and therefore draws incorrect conclusions, its focus on redistricting highlights the need to require statistical sampling methods such as the ICM for such non-apportionment purposes as redistricting and allocation of federal funds, even if the Court prohibits their use for reapportionment.

As discussed in the Los Angeles-Appellees' opening brief at 46-49, because ICM and similar DSE methods would improve the accuracy of population data used for Congres-

sional redistricting — and eliminate the differential undercount of minorities and the poor — their use would advance compliance with the requirement of *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." And because the Secretary has determined that statistical sampling methods are feasible, their use for non-apportionment purposes is required by 13 U.S.C. § 195.[5]

In short, if this Court prohibits statistical sampling for apportionment purposes, its use will still be required for other purposes. This will result in a "two number census," one unadjusted and inaccurate for apportionment, the other

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[5] NRLA erroneously asserts that when Congress used "apportionment" in section 195, it intended to include intrastate redistricting in the term. NRLA Br. at 13-16. While it does not — because it cannot — cite any legislative history to support this departure from the statute's plain meaning, the NRLA, instead, cites numerous examples purportedly where the terms "apportionment and redistricting [were used] synonymously." *Id.* at 14-15. This Court, however, is not so confused about the difference between redistricting and apportionment. Indeed, it has "found this difference to be significant." *Wisconsin*, 517 U.S. at 13; see *Dept. of Commerce v. Montana*, 503 U.S. 442, 460 (1992). Further, this Court has noted significant legal differences among redistricting, apportionment, and the conduct of the census. *Wisconsin*, 517 U.S. at 18 ("[I]t is difficult to see why or how *Wesberry* would apply to the Federal Government's conduct of the census — a context even further removed from intrastate redistricting than is congressional apportionment.").

adjusted and far more accurate for redistricting and other purposes.[6]

D. Statistical Sampling Is Not Prone to Manipulation for Political Purposes.

The experts agree that statistical sampling will reduce the opportunity for political manipulation of the census. House J.A. at 128-132 (*Census 2000*). Since sampling has known, objective properties, it is preferable to the uncontrolled human error that results from a reliance on only traditional methods of enumeration. *Id.* at 129.

In addition, the Census Bureau has safeguards built into its plan for the 2000 census. *Id.* at 128-132. For instance, the Bureau's preparations for the 2000 census are being scrutinized by several blue-ribbon panels of statistical experts, including the 2000 Census Advisory Committee (consisting of 30 different professional governmental and non-governmental organizations), the Census Advisory Committee of Professional Associations,[7] and four different census advisory committees concerned with particular racial and ethnic populations. *Id.* at 56-57. Any attempt by one or more interest groups — inside or outside of the Bureau — to manipulate the census for political purposes is doomed to fail.

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[6] As noted in the Los Angeles-Appellees' opening brief, a "two number census" would be unlikely to include statistical sampling in the NRFU, but would include the ICM. Los Angeles-Appellees' Opening Brief at 48.

[7] This organization consists of the American Statistical Association, the Population Association of America, the American Economic Association, and the American Marketing Association.

Nonetheless, the Plaintiff-Appellees and some amici insist that the use of sampling will increase the risk of manipulation of the census. *See, e.g.*, House Br. 27, 48; Glavin Br. at 26 n.26, 49; Foundation Br. at 22-26. For instance, the Foundation claims "those charged with running" the 2000 census can manipulate the census figures because statistical sampling is based upon a set of "arbitrary assumptions."[8] Foundation Br. at 23. The Foundation, however, must admit that it has "no information" suggesting that the Census Bureau's staff will be coerced into manipulating any of its assumptions. *Id.* at 22.

Despite this admission, the Foundation won't let go. Like children around a campfire, the Foundation spins several scary stories that purportedly illustrate how the 2000 census could be manipulated. Like most such stories, they are pure fiction. For example, the Foundation constructs a hypothetical apparently designed to show that the ICM could be manipulated by local governments that, purportedly, "stand to reap huge rewards" by drumming up participation during the ICM phase. *Id.* at 28. The Foundation is way off base. The adjustment factors resulting from the ICM are not applied to the particular political subdivision where the sampled ICM block is located. Rather, they are applied to the block's entire stratum. House J.A. at 97-98 (*Census 2000*). Since each stratum spans an entire state and comprises hundreds or thousands of blocks, *id.* at 94, no single local

[8] The Foundation ignores the fact that these assumptions are based on two decades of research and empirical data and will be "locked in" well in advance of the 2000 census. House J.A. at 132 (*Census 2000*).

government could conceivably reap *any* reward whatsoever by manipulating the ICM in this manner.

II. SECTION 195 OF THE CENSUS ACT DOES NOT PROHIBIT SAMPLING FOR APPORTIONMENT.

The statutory arguments advanced by the House, Glavin-Appellees, and their amici mirror those made below, and were adequately refuted in the opening round of briefs. Two modest points, however, are worthy of additional response.

A. The General/Specific Statutory Analysis of Sections 141(a) and 195 Advocated by the House and Glavin Renders Section 141(a) Meaningless.

The Glavin-Appellees concede — as they must — that "[s]tanding alone, [section 141(a)] would authorize the Secretary to sample for all purposes encompassed in the 'decennial census of the population,' including determining the population number to be used for congressional apportionment." Glavin Br. at 26. So far, so good.

They — along with the House and their collective amici — then offer the construction of sections 141(a) and 195 shown in the table below:

Use of Sampling	§ 141 (a)	§ 195
Use of statistical sampling for apportionment	Secretary may use it in his discretion	Secretary may not use it
Use of statistical sampling for other purposes	Secretary may use it in his discretion	Secretary may use it in his discretion

Arguing that section 141(a) is "general" and section 195 is "specific," they conclude that section 195 controls. *See* Glavin Br. at 29; House Br. at 29.

But this construction, of course, renders section 141(a) mere surplusage. On the issue of the use of statistical sampling for apportionment, they say section 141(a) is trumped by section 195. And on the issue of the use of statistical sampling for all other purposes, they say the two statutes mean the same thing. Perhaps in recognition of this weakness, the House and Glavin-Appellees opine that section 141(a) really only contains "illustrative references to sampling of no substantive support [reflecting] Congress' modest intentions," and is nothing more than a little overlapping coverage that can be permissibly ignored. *See* House Br. at 30 & n.41; Glavin Br. at 40.

But the general/specific rule of construction is not intended to completely read the "general" section out of existence. Even the cases cited by the House and Glavin-Appellees make this abundantly clear. House Br. at 29 & n.40; Glavin Brief at 29 & n.30. For example, in *Morales v. Transworld Airlines, Inc.*, the Court found that a general

savings clause should not be applied where a specific section expressly dealing with preemption should be applied instead to preempt state consumer protection laws. 504 U.S. 374, 384-85 (1992). While the general savings clause was not applied, it still, however, had independent meaning that would be applicable in other circumstances not subject to preemption.[9]

"[T]he cardinal rule that, if possible, effect should be given to every clause and part of a statute" would itself be meaningless if the general/specific rule of construction could be applied to render general provisions nullities when other reasonable interpretations of the statute would save their meaning. *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932).

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[9] Likewise, in *HCSC-Laundry v. United States*, the Court found a "general" provision, 26 U.S.C. § 501(c)(3), which defines charitable institutions that are tax exempt, did not apply to a laundry run by a non-profit hospital services organization ("HSO") because there was a specific statute that listed the types of HSOs eligible for tax exempt status. 450 U.S. 1, 6 (1981). Nonetheless, section 501(c)(3) would — and clearly does — control in other circumstances. Similarly, in *United States v. Giordano*, a general statute regarding the U.S. Attorney General's broad delegation authority was trumped by a specific statute strictly limiting that delegation authority when authorizing wiretaps. 416 U.S. 505, 512-14 (1974). The fact that the Attorney General did not have the broad authority to delegate authorization for the wiretaps, however, did not render the general statute superfluous.

B. Changes in the Secretary's Position on Section 195 Do Not Diminish the Deference Due to the Secretary's Interpretation of the Act.

The Plaintiff-Appellees seem to place great weight on the fact that the Secretary's position on the legality and constitutionality of the use of sampling for apportionment purposes has evolved over the last few decades. *See* House Br. at 24-27; Glavin Br. at 40-41 & n.38. Citing correspondence and hearings transcripts — much of which was not in the record below — the House attributes the Secretary's embrace of a purportedly "radical theory" for interpreting section 195 to the instant litigation. House Br. at 26 & n.36. This, according to the House, relieves the Court from deferring under *Chevron* to the Secretary's interpretation of section 195. *Id.* at n.36.

The House is wrong. This Court has upon rare occasion found an agency's reasonable interpretation of an ambiguous federal law undeserving of deference. However, it has only done so when the suspect interpretation is a "'post hoc rationalization' advanced by an agency to defend past agency action." *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997). Here, the Appellants are not defending past use of sampling in the conduct of the census, so there is no past agency action to be justified after the fact. Merely because the "Secretary's interpretation comes to us in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference." *Id.; see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991); *see also National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("[D]eference to an interpretation offered in the course of litigation is still proper

as long as it reflects the agency's fair and considered judgment on the matter."). Thus, under these circumstances, the Appellants' shift in position is wholly irrelevant.

III. THE PLAINTIFF-APPELLEES' CONSTITUTIONAL ARGUMENTS ARE UNPERSUASIVE.

A. Enumeration Just Means "Census."

Buried within a footnote is a significant concession by the House: "enumeration" is synonymous with "census." House Br. at 46, n.63. No one disputes that the Census Bureau intends to conduct a census in the year 2000. The constitutional issue, therefore, is a non-issue.

B. The Constitution Requires a Periodic Census Rather than a Particular Method of Ascertaining the Population.

Just as they did in the district court below, the Plaintiff-Appellees continue to make "historical" arguments that amount to little more than "junk history." Once again they erroneously contend that the "permanent & precise standard" that the Framers sought requires a certain method of conducting the census, when in fact, it had absolutely nothing to do with census-taking methods. *See* Glavin Br. 7, 50; House Br. 44, 48-49.[10]

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[10] The House has apparently recognized that they were on shaky historical ground below. Rather than quoting the "permanent & precise standard" language contained in the records of the Federal Convention, *see* 1 *Records of the Federal Convention of 1787* at 578 (Mason, July 11) (Max Farrand, ed. 1911), as they did in the district court, they have substituted their own wording, for example, "fixed, objective standard" (House Br. at 48) to stand for the same erroneous proposition.

As noted in the Los Angeles-Appellees' opening brief at 38-44, the "permanent & precise standard" urged by George Mason and ultimately adopted by the delegates was a periodic census of the inhabitants of the states. Congress was expressly given discretion to conduct the census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

C. The Framers Were Not Nor Could Not Be Opposed to Statistical Sampling.

The House makes the nebulous claim that Jefferson was "familiar with estimation." House Br. at 11. In the district court, however, the House was a little bolder. It claimed that Jefferson "was familiar with *methods of statistical* estimation." Memorandum for Plaintiff United States House of Representatives in Support of Its Motion for Summary Judgment at 12 (Apr. 6, 1998). Its retreat is no accident.

As the House learned in the district court, Jefferson could not have used statistical estimation because it was not yet available. House J.A. at 377 (Fienberg Decl. ¶ 42). Statistical estimation was probably first attempted by Pierre Simon LaPlace in 1783, who used ratio estimation to calculate France's population. *Id.* It was many years before LaPlace's idea would develop into the theory of statistical estimation and 160 years before it would be used again in a census context. *Id.* Jefferson could not have used probability sampling methods because they were not developed for another 120-130 years. *Id.* When Jefferson "estimated" Virginia's population in 1782, he was making an educated guess based on his limited information. Thus, the reason why "no one suggested that Congress 'augment' the census

with statistical estimation," House Br. at 49, in the Framers' day is because this method did not yet exist.

IV. CONCLUSION

For all the reasons stated above, the judgments of the district courts should be reversed.

Respectfully submitted,

Dated: November 17, 1998

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Nos. 98-404 and 98-564

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IN THE

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

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REPLY BRIEF FOR APPELLEES RICHARD A. GEPHARDT, DANNY K. DAVIS, JUANITA MILLENDER-McDONALD, LUCILLE ROYBAL-ALLARD, LOUISE M. SLAUGHTER, and BENNIE G. THOMPSON SUPPORTING APPELLANTS

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IN THE

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OCTOBER TERM, 1998

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This Court should allow the Census Bureau to proceed with its planned methodology for conducting the 2000 Census. Use of this methodology, which will substantially increase accuracy of the census and reduce the undercount of groups that have traditionally been excluded, is plainly acceptable under

the only harmonious interpretation of the Census Act, as well as under the Constitution.

Appellees devote the bulk of their arguments on the merits to the claim that the Census Act precludes the Census Bureau from using sampling in the 2000 Census. Although appellees also make a nominal effort to argue that the use of sampling is unconstitutional, appellees gloss over the many arguments in the opening briefs that clearly demonstrate the fallacy of this claim. Similarly, although appellees argue that the Census Bureau's planned methodology may actually decrease accuracy and increase political manipulability, they cannot actually rely on these arguments -- which are erroneous in any case -- given that they are making a facial challenge to the use of sampling, they never contested accuracy as a basis for their claim in the court below, and they are defending grants of *summary* judgment.[1] Intervenors will therefore focus this reply on the primary issue before this Court: whether the Census Bureau's planned methodology is permissible under the Census Act. Because the answer is yes, this Court should reverse.

[1] Appellees Glavin *et al.* spend significant effort trying to demonstrate that one of the two types of sampling the Census Bureau plans to use, sampling for nonresponse follow-up, decreases accuracy. Glavin Br. 2-3, 41-42. But appellees are challenging both types of sampling the Bureau plans to use. Moreover, sampling for nonresponse follow-up does help ensure accuracy by shortening the time required for the initial count and thus improving the effectiveness of the next phase of the process. Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress -- The Plan for Census 2000*, JA 89-90 (rev. Aug. 1997). And by allowing the Bureau to save significant money, it enables the Bureau to undertake the Dual System Estimation process and thereby enhance accuracy overall.

I. THE PLAIN LANGUAGE OF THE CENSUS ACT PERMITS SAMPLING.

Appellees fail to refute intervenors' showing that the most harmonious reading of the Census Act allows the Census Bureau to proceed with its planned methodology for the 2000 Census. This failure is fatal. Because the language of the Act, properly interpreted, points to a single correct interpretation, appellees' analysis of legislative "intent," based on history, presumptions, and legislative silence, is irrelevant. Moreover, it is flawed on its own terms.

Read together, sections 141 and 195 of the Census Act plainly permit sampling for purposes of apportionment. Appellees do not deny that on its face section 141 of the Act authorizes sampling for all purposes in the decennial census including apportionment, which is, after all the central purpose of the decennial census; indeed, appellees Glavin *et al.* forthrightly acknowledge that "[s]tanding alone, this provision would authorize the Secretary to sample for all purposes encompassed by the 'decennial census of population,' including determining the population number to be used for congressional apportionment." Br. 26.

Appellees also acknowledge the obligation to read different statutory sections harmoniously. *See, e.g., id.* at 27. Yet appellees, while arguing that the best interpretation of section 195 standing alone is that it prohibits sampling for purposes of apportionment, do not contend that this is the only possible reading of the text. Nor do they seriously contest that intervenors' interpretation is the more harmonious one. Under that interpretation, the Census Bureau is required to use sampling, if feasible, outside of the context of apportionment

and is allowed to use sampling within the context of apportionment. As a result, sections 141 and 195 both have meaning and there is no need to read a gaping exception into section 141 with respect to sampling used for apportionment purposes.[2] Appellees' interpretation, in contrast, creates such a gaping exception. Section 141's authorization of the use of sampling in the decennial census is read as not extending to

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[2] Appellees Glavin *et al.* argue that intervenors' interpretation fails to give meaning to the "except" clause in section 195. They assert that if the except clause did not exist, the Bureau would nonetheless have discretion to determine whether to use sampling for apportionment -- which intervenors assert is the purpose of the except clause. Glavin Br. 27-28; *cf.* House Br. 34 ("the feasibility standard established in § 195 would surely be broad enough to permit the Secretary to insist upon the use of the method that will produce the most accurate population figures practicable") (quotation omitted). This is nonsense. As appellees themselves acknowledge, "Section 195 limits the Secretary's discretion concerning the circumstances in which non-apportionment sampling may be used" by requiring use of such sampling, if feasible, Glavin Br. 29; in the absence of the except clause, this same limitation would apply to sampling for apportionment purposes.

Thus, absent the "except" clause, the Bureau would at least arguably be obliged to use sampling for apportionment, so long as a reasonable case could made that sampling was accurate, even if the Bureau was not yet confident that sampling was the best method. The term "feasible" would provide the Bureau some discretion to refrain from using sampling, but not nearly as much as existed once Congress exempted apportionment from the requirement altogether. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) ("the requirement that there be no 'feasible' alternative route admits of little administrative discretion"); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (holding that a requirement conditioned on feasibility was conditioned on whether it was capable of being done). In creating the exception, Congress intended to make absolutely clear that the Census Bureau had discretion not to sample even if it thought that sampling was "capable of" producing data that could be used for apportionment.

apportionment, the core purpose of the decennial census.[3] Under appellees' interpretation, therefore, section 195 is not simply redundant with section 141 rendering it "of no substantive import," as the House acknowledges to be true, House Br. 30, it takes *back* some of the authority to sample that section 141 explicitly provides. As a result, unless it is not "reasonably possible" to read section 195 as intervenors suggest, intervenors' harmonious interpretation, not appellees' discordant one, is correct. *Louisiana Pub. Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986); Gephardt Br. 17-18 (citing cases).

Appellees insist that intervenors' harmonious interpretation must be rejected because section 195 unambiguously prohibits sampling for apportionment purposes. But appellees do not argue that the *language* of section 195 unambiguously prohibits sampling. Appellees instead rely on historical inferences, free-standing presumptions, and legislative silence to argue that the meaning of the Census Act is not plain, *see* House Br. § II.A., and they then argue that because the meaning is not plain, this Court must rely on the same inferences, presumptions and legislative silence to interpret the Act, *see* House Br. 38. Such an effort to "bootstrap" a non-textual statutory interpretation should not be countenanced.

As intervenors showed in their opening brief, ordinarily the except/shall structure contained in section 195 does not

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[3] Appellees point out that under each parties' interpretation, section 195 limits the discretion granted by section 141, by requiring the use of sampling, if feasible, outside the context of apportionment. House Br. 29, Glavin Br. 29. But the fact that the two sections are not entirely harmonious outside the context of apportionment does not justify interpreting them as flatly inconsistent within the context of apportionment.

constitute a prohibition, especially in a statutory context. Gephardt Br. 20-22.[4] Appellees offer little to refute this. Instead, they respond that the language of section 195 does not clearly enough *allow* sampling to be read in its ordinary way given that "it is exceedingly unlikely" that Congress would have given the Census Bureau authority to sample in light of the statutory and historical context, and there is no "plausible alternative explanation of why Congress would have excepted apportionment from § 195's mandate" other than that it intended to prohibit sampling for apportionment. House Br. 32-34; *see id.* at 38 (describing "[t]he absence of plain language to *support* [intervenors'] argument") (emphasis added). Appellees are incorrect with respect to their assessment as to what Congress was likely to have done and their evaluation of the historical context, but more important, none of these assessments of "likeliness" and "plausibility" show that section 195 *unambiguously* prohibits sampling. As a result, this Court should read section 195 as allowing sampling for apportionment purposes, because only that interpretation makes section 195 harmonious with section 141. Indeed, such an interpretation of section 195 is the only reasonable one, because rather than relying on an assessment of what Congress was likely to have done with respect to sampling, it relies on what Congress did do in section 141. Any claims of "obliqueness" or "ambiguity" are eliminated when the two sections are read together.

[4] Contrary to the claim of appellees Glavin *et al.*, Br. 37-38, the fact that the "shall" in section 195 is cabined by the phrase "if feasible" is not relevant for determining the meaning of the exception. For example, the sentence "except for federal holidays, law clerks shall, if feasible, report to work on Monday through Friday" leaves the clerks discretion to come to work on federal holidays despite the use of the phrase "if feasible" in the "mandatory" part of the sentence.

Moreover, appellees' assessment of "plausibility" is simply incorrect. Appellees argue that in light of the constitutional significance of apportionment and the existence of standards governing the use of sampling outside the apportionment context, it is implausible that Congress would have delegated unfettered discretion to the Census Bureau to use sampling in the apportionment context. House Br. 32-33. But the discretion delegated by the Census Act is not unfettered -- it is fettered by the constitutional requirement of reasonable accuracy, *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996), and the statutory requirement that the census produce a tabulation of the "whole number of persons in each state." 2 U.S.C. § 2a; *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992) (explaining that section 141 is not standardless, because section 2a "embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.") (Stevens, J., concurring in the judgment, joined by Blackmun, J., Kennedy, J., Souter, J.). And, in any event, it is perfectly plausible that a Congress that believed that the Census Bureau should be required to use sampling, if feasible, outside the context of apportionment, including, for example, to gather population figures in the mid-decade census, would have determined that the Census Bureau should at least be allowed to use sampling in the apportionment context.[5] The special constitutional status of the census (and continuing doubts about the accuracy of existing sampling techniques for apportionment

[5] The plausibility of such a delegation of authority is not in any way undercut by the fact that section 181 only allows the Census Bureau to use sampling to gather annual population data if it first determines that sampling will produce reliable data. House Br. 33. Congress chose to supply such standards with respect to the gathering of annual population figures, because the Constitution and section 2a did not already supply such standards, as they do with respect to apportionment.

purposes) simply explain why Congress did not *require*, if feasible, the use of sampling for apportionment.

Because it is perfectly plausible on its face that section 195 simultaneously requires that the Census Bureau use sampling, if feasible, outside the context of apportionment, and provides discretion to use sampling in the context of apportionment, section 195 -- even considered alone -- cannot be read to prohibit sampling for purposes of apportionment. The only examples appellees provide in which an exemption from a mandate reflects an unexpressed prohibitory intent are ones in which the nature of the mandate *on its face* makes it implausible that the speaker intended to establish anything but a prohibition in the excepted area. A woman who directs a servant to take all of her clothes to the cleaners except one particular item of clothing (*e.g.*, a wedding dress) has clearly considered which of her clothes should be taken to the cleaner and which should not; there is simply no plausible reason why she would allow the servant to determine whether to take the remaining item to the cleaner. In contrast, because it *is* plausible on its face that Congress would want to leave the expert Census Bureau discretion to use sampling for apportionment, section 195 cannot be read as prohibiting the Bureau from doing so.

II. APPELLEES' NON-TEXTUAL ARGUMENTS ARE EVASIVE AND ULTIMATELY UNPERSUASIVE.

Appellees ask this Court to depart from the best reading of the language of the Census Act based on assertions about congressional "intent" supposedly grounded in the history of the census and the Census Act. But this approach, in addition to being wrong in principle, *see, e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-78 (1992), is

unpersuasive on its own terms because appellees overstate the evidence supporting their interpretation, while making only passing reference in footnotes to facts that contradict their view.

A. Neither Congress Nor the Census Bureau Had, Prior to 1976, Evinced a Long-Standing Aversion to Sampling.

First, appellees attempt to show that the 1976 Amendments, if interpreted to allow sampling, would have been an abrupt departure from two centuries of contrary practice. That is a vast overstatement. The legislation in the 19th and early 20th century prescribing methods for census taking did not constitute a conscious rejection of accuracy-enhancing sampling techniques, because those techniques were simply not known. Gephardt Br. 29-30.[6] This was still true in 1957 when Congress exempted apportionment from its

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[6] The forms of demographic *estimation* known to the Framers were nothing like the scientific statistical methodologies that the Census Bureau plans to employ in the year 2000. Colonial population estimation "rested substantially upon an elaborate fabric of educated guesses." James H. Cassedy, *Demography in Early America* 72 (1969). In particular, "Jefferson's method of obtaining his summary figures is confusing and apparently not accurate . . . ." Evarts B. Greene & Virginia D. Harrington, *American Population Before the Federal Census of 1790*, at 142 n.10 (1932). And even if Jefferson's technique had been accurate, Jefferson had no way of knowing this to be so and no reason to expect that it would be accurate if applied more generally. Nonscientific estimation methods lack the certainty and reliability of modern statistical sampling methodologies, which permit rates of error to be measured and thus controlled. *See Report to Congress*, JA 116-17. It is little wonder, then, that until recently Congress required the census to be taken primarily by inquiry at each household, because until recently no reliable method existed that could more accurately ascertain the size and distribution of the American populace.

authorization to the Census Bureau to use sampling; Congress was concerned only with long-form type sampling aimed at efficiency rather than increased accuracy. *Id.* at 8-9, 33-35. It was not until the 1970s that broad-based sampling techniques designed to increase the accuracy of the census became prominent. By that time a smaller scale version of sampling -- imputation -- had already been used and implicitly accepted for over thirty years, two other forms of sampling had been used to increase the accuracy of the 1970 census and praised in a congressional report, and Congress had already adopted a significant number of innovations in the census designed to increase accuracy, or conferred discretion on the Census Bureau to do so. *Id.* at 5, 30-31 & n. 21.[7] Moreover, just before it amended the Census Act in 1976, Congress held hearings in which it discussed the use of statistical techniques, including sampling, to increase the accuracy of the census, without any Members expressing doubt as to the desirability of using such techniques when they were fully developed. *Id.* at 32. Thus, it is entirely plausible -- indeed logical -- to infer that Congress in 1976 decided to make clear by amending the Census Act that the Census Bureau had the discretion to use these new techniques.

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[7] While admitting that "Congress has delegated the Secretary greater authority over the course of time," the House contends that a few of the 1976 amendments actually limited the Secretary's discretion somewhat. House Br. 37 n. 50. But this hardly undermines the argument that the grant of discretion to the Secretary to use sampling for apportionment was consistent with a long-standing historical trend. Indeed, this trend was evidenced in the 1976 legislation itself in areas that include, but also go beyond, sampling. Thus, section 141(a) and (d), for example, give the Secretary broad-based authority to conduct the decennial and mid-decade censuses "in such form and content as he may determine." Moreover, the House does not deny the existence of a second historical trend towards adoption of innovations designed to enhance accuracy.

Appellees fail in their attempt to minimize the significance of this historical evidence. They argue that the use of statistical imputation since 1940 is somehow consistent with the existence of a continued congressional aversion to sampling, because imputation was only used as a last resort to fill in the gaps left by a headcount. House Br. 50 n. 69. But this does not alter the fact that from 1940 onward statistical imputation was viewed as a reasonable means of enhancing the accuracy of the census. Moreover, the statistical techniques planned for the 2000 Census are in many respects quite similar to statistical imputation in that they are used to adjust the results of an inaccurate headcount. *See* Glavin Br. 2-3 ("The Department will simply estimate the number and demographic composition of these unknown persons by *imputing* to them the population and demographic characteristics of the nearest nonresponding households.") (emphasis added and deleted).

Appellees similarly attempt to deflate the importance of the sampling techniques used in 1970 by contending that they made the Census Bureau "uneasy." House Br. 37, n. 51. But regardless of the uneasiness of the Bureau about the arguable illegality of these techniques at the time, these techniques were ones that a congressional report expressly endorsed and suggested expanding, making it plausible, indeed likely, that Congress decided to make clear the legality of these techniques and other similar ones in 1976. The House suggests that Congress may have forgotten that these techniques had been used in 1970 by the time it enacted the 1976 amendments. *Id.* at 43. But it is reasonable to presume that a Congress that had issued a report praising these techniques, and that had continuing responsibility for overseeing the Census Bureau, understood the fairly extensive use of sampling that had occurred in the census a mere six years earlier. Certainly, in assessing whether it is plausible that Congress in 1976

conferred discretion on the Census Bureau to use sampling for apportionment, the history of the 1970 census is more relevant than the 1790 or 1800 censuses on which appellees rely.

Appellees also argue, in a variant of their claim that the dog did not bark, that the history of congressional acceptance of innovations designed to increase the accuracy of the census and/or confer increased discretion on the Census Bureau is irrelevant, because prior innovations were only adopted after extensive congressional debate, whereas there was little debate on the use of sampling for apportionment in 1976. House Br. 37, n.50. But apart from the fact that this Court has correctly expressed caution as to the value of legislative silence as a means of inferring congressional intent, Gephardt Br. 27-28, appellees are simply incorrect that prior innovations always engendered substantial controversy. For example, appellees do not dispute that the Census Act, as currently worded, allows the Census Bureau to adjust the results of a headcount by using birth and death statistics and that 1976 congressional hearings evidenced some support in Congress for such an adjustment, *id.* at 23; yet Congress never at any point explicitly discussed whether to confer such authority on the Census Bureau. Similarly, when Congress in 1957 conferred authority on the Census Bureau to use sampling outside the apportionment context, it did so with only minimal discussion in the legislative history and no apparent controversy. S. Rep. No. 85-698, (1957), *reprinted in* 1957 U.S.C.C.A.N. 1706, 1708; H.R. Rep. No. 85-1043 (1957); *Amendment of Title 13 United States Code, Relating to Census: Hearings on H.R. 7911 Before the House Comm. on Post Office and Civil Service*, 85th Cong. (1957). And in 1964, when Congress conferred on the Census Bureau authority to conduct the census by mail, it also did so without controversy, although with somewhat more extended discussion. It did not, however, discuss the many

ways in which the Census Bureau could potentially have used its newfound discretion beyond adoption of a mail out census. Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737 (1964); S. Rep. No. 88-1474 (1964), *reprinted in* 1964 U.S.S.C.A.N. 3308; H.R. Rep. No. 88-373 (1964). Finally, in 1977, when Congress considered (and ultimately rejected) *requiring* development and use of statistical techniques to correct for the undercount, there was very little mention in hearings of this proposed requirement. H.R. 8871, 95th Cong. § 144 at 137 (1977) (introduced on August 7, 1977 by Cong. William Lehman and Patricia Schroeder), *reprinted in The Census Reform Act: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 95th Cong., at 137 (1977); H.R. 10386, 95th Cong. § 143 (1977) (introduced on December 15, 1977 by Cong. Lehman, Schroeder, Solarz, and Howard). Thus, it is quite plausible that Congress deliberately adopted without significant debate or controversy amendments that had as one of their intended effects *allowing* the Census Bureau to use sampling for apportionment.

Indeed, there is no other explanation for Congress's amendment of section 141(a) to add language authorizing sampling in the decennial census. As appellees admit, under their interpretation, the 1976 amendment to section 141(a) provided the Census Bureau no new authority to use sampling in conducting the decennial census despite the addition of this specific language. House Br. 30. Appellees argue that the purpose of the amendment was simply to clarify some ostensible ambiguity that existed in prior grants of authority to use sampling outside the context of apportionment. *Id.* at 30. But appellees do not explain what ostensible ambiguity was being clarified. Appellees also assert that because language added to section 141(d) did not have any substantive import,

and this language was identical to the language added to section 141(a), it can be inferred that Congress did not intend its amendment to section 141(a) to have any substantive import. But the language in section 141(d) was added *after* the language in section 141(a), in order to make it parallel to the latter section. *See* Gephardt Br. 19 n.10. Thus, the redundancy of the language in section 141(d) fails to overcome the presumption that Congress intended its amendment of section 141(a) "to have real and substantial effect." *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 397 (1995).

B. Appellees, While Relying on Supposed Indicia of Legislative Intent, Never Claim that Congress Affirmatively Intended to Bar the Use of Statistical Adjustments to Increase the Accuracy of the Census.

The second flaw in appellees' intent argument is that, while relying on evidence of intent outside the statutory text, appellees can produce not the slightest indication of a conscious legislative intent, in 1957 or 1976, to bar the use of sampling to *adjust* the census to make it *more* accurate. Indeed, the historical evidence suggests that Congress long approved of such techniques in the form of imputation and the 1970 statistical adjustments.

Appellees address the issue of congressional intent to bar statistical adjustments only in a single footnote in the House brief. House Br. 36 n.49. In that footnote, the House *never even claims that Congress ever opposed statistical adjustments like those at issue here.* Instead, it offers two unpersuasive arguments for ignoring this flaw in its position. First, it claims that the sampling plans for 2000 go beyond "adjustment." *Id.* That is just wrong. The Census Bureau in 2000 plans to mail

census forms to *every* household in the nation, just as it has in the past. *Report to Congress*, JA 59-62, 77-78. The Bureau will also provide census forms in public places such as shopping malls, and will publicize a toll-free telephone number for those who wish to respond by phone. *Id.* at 77-78. This is a headcount, and the Bureau's planned use of sampling is designed to adjust this initial headcount. There is simply no basis for arguing that a headcount requires a certain *number* of attempts to contact each household; at some point, the census has always stopped trying to contact nonresponding households. At a minimum, the second half of the Bureau's proposed method -- the ICM follow-up survey -- is an "adjustment" method under any theory, and could be separately upheld on that basis.

Second, the House argues that intervenors' "special plea for sampling-based adjustment" is not grounded in the plain text of the Act, which either allows the Census Bureau to use sampling or does not. House Br. 36 n.49. But intervenors are not making a "special plea for sampling-based adjustment." Intervenors' argument is that on its face the present version of the Census Act categorically allows sampling when reasonably accurate. It is appellees who argue for a departure from the best reading of the text based on a psychoanalysis of congressional intent. Intervenors have simply explained that if this Court is to adopt that kind of approach, it would be odd to reach a result that all parties seem to agree Congress never intended, based on the fact that the plain language of the statute -- using the single term "sampling" -- does not support a distinction between types of sampling. The way to avoid this conundrum is to resist the invitation to reject the best reading of the statutory text, and to conclude that the Act authorizes the Secretary (subject to constitutional and other constraints) to

proceed with the carefully developed methodology that he, in his expert judgment, has determined is best.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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No. 98-564

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, ET AL., APPELLANTS

v.

MATTHEW GLAVIN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

A. The Census Bureau's Plan Is Based On Its Determination, Supported By Abundant Scientific Evidence, That Use Of Statistical Sampling Will Improve The Accuracy Of The Relevant Population Figures

Two forms of statistical sampling are at issue in this case. See Gov't Br. 6-7. First, the Census Bureau intends to employ sampling during the Nonresponse Follow-Up (NRFU) phase of the census by sending enumerators to a substantial and representative sample of households that fail to return mail questionnaires. See 98-404 J.A. 88-92. Second, the Bureau intends to conduct an intensive survey of approximately 750,000 housing units after the NRFU phase of the census is complete. *Id.* at 92-93. Through a process known as Integrated Coverage Measurement (ICM), the Bureau will compare the results of that survey to those of the initial phase of the census in order to determine population figures for States and political subdivisions nationwide. *Id.* at 94-98. Each of those forms of sampling is integral to the Bureau's efforts to increase the accuracy of the 2000 census, and each has broad support within the scientific community.[1]

1. As we explain in our opening brief in No. 98-404 (at 5), Congress in 1991 directed the Secretary of Commerce to contract with the National Academy of Sciences (NAS) to

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[1] In the district court, appellees specifically disavowed any effort to establish that the use of statistical sampling would decrease the accuracy of the relevant population figures. Their memorandum of law in opposition to the government's motion to dismiss stated (at 29 n.11) that "plaintiffs do not seek to involve [the district court] in a battle of statistical experts given that their complaint alleges that the Department's plan violates both federal law and the Constitution irrespective of its purported accuracy." For purposes of this case, the Court must therefore assume the correctness of the Census Bureau's determination that its plan for the 2000 census will produce more accurate population figures than would a census conducted without the use of sampling. As we explain below, that determination is supported by abundant scientific evidence.

study possible means of improving the accuracy of the census. See Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (13 U.S.C. 141 note). The NAS was instructed to consider, *inter alia*, "the appropriateness of using sampling methods." § 2(b)(1)(C), 105 Stat. 635. The NAS subsequently established three panels, each of which "concluded that traditional census methods needed to be modified in response to societal changes, and that statistical sampling techniques would both increase the census' accuracy and lower its cost." 98-404 J.S. App. 4a.

The NAS Panel on Census Requirements in the Year 2000 and Beyond stated that

> physical enumeration or pure 'counting' has been pushed well beyond the point at which it adds to the overall accuracy of the enumeration. Moreover, such traditional census methods still result in a substantial undercount of minority populations. Techniques of statistical estimation can be used, in combination with the mail questionnaire and a reduced scale of follow-up of nonrespondents, to produce a better census at reduced costs.

Modernizing the U.S. Census at 3-4 (B. Edmonston & C. Schultze eds., 1995).[2] The Panel to Evaluate Alternative Census Methods "conclude[d] that sampling and associated

[2] Dr. Charles L. Schultze was the chairman of the Panel on Census Requirements in the Year 2000 and Beyond. He has since testified on two occasions to reiterate the view that the use of sampling mechanisms can be expected to make the 2000 census both more accurate and less costly. In his most recent testimony he stated: "[T]he bottom line is clear. The careful use of modern statistical techniques to help complete the Census will yield more accurate data for purposes of Congressional apportionment and the other major uses to which the census data is put, and at the same time reduce budgetary cost." *Census 2000: Hearing Before the Senate Comm. on Governmental Affairs*, 105th Cong., 1st Sess. 54 (1997) (*1997 Hearing*). Dr. Schultze observed "as an economist" that "it is not often that you run across areas in which you can get both better quality and lower costs, so it is a little bit unique, in a way." *Ibid.*

statistical estimation constitute an established scientific methodology that must play a greater role in future censuses in order to obtain a more accurate picture of the population than is provided by current methods." *Counting People in the Information Age* at 4 (D. Steffey & N. Bradburn eds., 1994). The panel "endorse[d] the Census Bureau's stated goal of achieving a one-number census in 2000 that incorporates the results from coverage measurement programs, including programs that involve sampling and statistical estimation, into the official census population totals." *Ibid.*

A third NAS panel (the Panel to Evaluate Alternative Census Methodologies) has issued two interim reports, with its final report expected by the end of 1998. The first report stated that "the use of sampling and other statistical procedures will be fundamental to achieving the goals of reduced costs, increased accuracy, and reduced differential undercoverage." *Sampling in the 2000 Census Interim Report I*, at 2 (A. White & K. Rust eds., 1996). The second report concluded that "a census without sampling will almost certainly be unacceptable in terms of both quality and cost." *Preparing for the 2000 Census Interim Report II*, at 6 (White & Rust eds., 1997).[3]

[3] That report acknowledged that the use of sampling might decrease the accuracy of population counts for very small geographic areas (*e.g.*, census blocks), but stated that error rates for small geographic areas are "not an appropriate criterion for judging the quality of the census." *Preparing for the 2000 Census Interim Report II*, at 11-12. The report concluded that for geographic levels "hav[ing] important legal, political, or financial implications," the use of sampling "can achieve results that are at least as good as those from a more time-consuming and expensive effort to obtain a completed form for every household." *Id.* at 12.

The General Accounting Office (GAO) has similarly concluded that "the Bureau's plan [for the 2000 census], if effectively implemented, has the potential for producing a more accurate and less costly census than if only conventional census procedures were used." *2000 Census Progress Made on Design, but Risks Remain*, GAO/GGD-97-142, at 22 (July 1997). That report noted the GAO's prior conclusion, reflected in testimony given on

2. Two of the three NAS panels unequivocally endorsed both of the uses of sampling at issue in this case—*i.e.*, sampling for non-response follow-up (NRFU) and integrated coverage measurement (ICM). See *Modernizing the U.S. Census*, at 87-96; *Preparing for the 2000 Census Interim Report II*, at 6.[4] Appellees contend that "[i]t is undisputed that sampling for nonresponse follow-up *decreases accuracy*." Glavin Br. 3; see also *id.* at 41. That statement is entirely untrue. The Census Bureau believes that NRFU sampling will increase the accuracy of the census as a whole, and its view is supported by abundant scientific evidence.[5]

NRFU is highly labor-intensive, requiring the Bureau to hire a very large number of temporary enumerators. See, *e.g.*, 98-404 J.A. 100 (Census Bureau's *Report to Congress* states that "[a]t peak employment, about 117,000 workers * * * would be hired to conduct the nonresponse follow-up" if sampling is utilized, and that "59,000 additional enumerators" will be needed if the Bureau does not employ NRFU

October 25, 1995, "that the established approach used for taking the census in 1990 had exhausted its potential for counting the population cost-effectively and that fundamental design changes were needed to reduce census costs and improve the quality of the data collected." *Id.* at 1.

[4] With respect to NRFU sampling, the analysis of the third NAS panel (the Panel to Evaluate Alternative Census Methods) was equivocal. See *Counting People in the Information Age* at 97-105. Appellees refer to the view of that panel (Glavin Br. 42 n.39) but omit all reference to the two NAS panels that recommended in favor of NRFU sampling.

[5] Although attacks on the Bureau's plan to utilize NRFU sampling are a recurring feature of appellees' brief, appellees have not alleged or attempted to prove that use of NRFU sampling will injure them in any way. Appellees do not contend that NRFU sampling will cause the States or localities in which they live to be credited with a smaller percentage of the population than those areas would receive under full NRFU. Rather, appellees' claim of injury is addressed exclusively to the use of sampling in the ICM process and is grounded in the purported similarity between the ICM mechanism devised for the 2000 census and the adjustment methodology considered (and ultimately rejected) for the 1990 census.

sampling).[6] Because the use of sampling reduces the number of enumerators required, NRFU sampling "gives reasonable promise that accuracy can be improved and differences in the quality of enumeration can be diminished by concentrating the efforts of better enumerators on the sampled cases." *Sampling in the 2000 Census Interim Report I*, at 6; see also *Preparing for the 2000 Census Interim Report II*, at 7.[7] Use of sampling also ensures that the NRFU phase can be completed within a much shorter period of time than was required during the 1990 census. By decreasing the time required for the NRFU phase, sampling has the potential to

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[6] In October 1995, then-Census Bureau Director Riche testified that

> sampling may not be just an attractive cost-saving option; it may be the only option we now have for completing the census. And that's because, historically, we have recruited those large numbers of census takers amongst people who weren't in the labor force, who weren't seeking permanent work. Many of them had previous work experience and skills, so we only had to train them for the technical part of the task at hand. Today, the pool of workers qualified, experienced, and able to work on a decennial census has decreased dramatically.

Oversight of the Census Bureau: Preparations for the 2000 Census: Hearing Before the Subcomm. on National Security, International Affairs, and Criminal Justice of the House Comm. on Government Reform and Oversight, 104th Cong., 1st Sess. 76-77 (1995).

Dr. Schultze has more recently explained that the problems associated with the 1990 census "were exacerbated by the growing difficulty of finding, at reasonable costs, sufficient numbers of qualified Census enumerators. Turnover rose and productivity fell." *1997 Hearing* at 131. Dr. Schultze further observed that "[t]he recent 1995 census tests suggest that the difficulty and costs of attracting qualified census enumerators have accelerated." *Ibid.*

[7] Dr. Schultze explained: "[B]y applying adequate resources to a smaller number of sample units in each census tract, a high quality follow up can be achieved for those units and the results extrapolated to the rest of the tract. Even though sampling error is thereby introduced in the extrapolation, the higher quality of the results within the sampling units should offset or more than offset the sampling errors." *1997 Hearing* at 132.

increase the accuracy of the NRFU data themselves, to improve the quality of the subsequent ICM, and to ensure that the census is completed in time to permit the transmittal of state-level population figures to the President by January 1, 2001, as required by 13 U.S.C. 141(b).[8]

Appellees place substantial reliance (see Glavin Br. 3, 41) on a report issued in 1997 by the General Accounting Office (GAO). The passage on which appellees rely states:

> Technically, the most accurate design alternative, according to the results of the Bureau's research, would be to attempt 100-percent follow-up of nonrespondents and use ICM to address accuracy problems. That design could produce slightly improved accuracy in census data, particularly for smaller geographic areas, but would come at a greater cost (approximately $400 million more than that for the Bureau's refined plan). Furthermore, such an option may not be feasible given projected staffing difficulties and, especially, the risk that the Bureau could not complete 100-percent follow-up and ICM by the December 31 deadline for reporting census results for congressional reapportionment.

[8] As one NAS panel explained,

> the use of sampling will reduce the field workload and may result in more timely completion of the nonresponse follow-up procedures in the field. This increased timeliness will increase data quality because respondents will typically be giving information to enumerators closer to census day than they would if nonresponse follow-up without sampling were implemented. There will be fewer recall errors and less use of poor-quality "last-resort" information obtained from indirect sources in the final stages of field data collection. In addition, the more timely completion of nonresponse follow-up will permit the coverage measurement survey to be implemented in the field closer to census day, thereby decreasing recall errors and the effect of people who move on the process of coverage measurement and correction.

Preparing for the 2000 Census Interim Report II, at 6-7.

2000 Census Progress Made on Design, but Risks Remain, GAO/GGD-97-142, at 26-27 (July 1997) (1997 GAO Report). Appellees quote the first sentence of that passage (see Glavin Br. 3, 41), ignoring (1) GAO's apparent agreement that ICM will improve the accuracy of the relevant population figures and (2) GAO's own doubt that full non-response follow-up could feasibly be conducted (at least in conjunction with ICM) given anticipated staffing difficulties and the existence of an inflexible statutory deadline (see 13 U.S.C. 141(b)) for transmittal to the President of complete state-level population figures. The clear thrust of the paragraph as a whole is that while NRFU without sampling might in theory lead to modest gains in accuracy for smaller geographic areas, any effort to implement both full NRFU and ICM would face substantial practical difficulties.[9]

Appellees contend (Br. 3) that the Bureau plans to utilize NRFU sampling "solely in order save time and money, not because it even arguably increases accuracy." That statement is incorrect and postulates a false dichotomy. The Bureau believes that, if the NRFU phase of the census is viewed in isolation, sampling will neither substantially improve nor substantially decrease the accuracy of the counts. Because NRFU sampling will leave more time, funds, and trained personnel available for the ICM, however, and will permit the ICM to begin nearer in time to the census date, it

[9] The NAS Panel to Evaluate Alternative Census Methodologies has observed that "[a] modest nonresponse follow-up design (i.e., one with a relatively small workload) that is executed as planned is far superior to a more ambitious design that runs short of time or resources." *Preparing for the 2000 Census Interim Report II*, at 41. Given the existence of substantial doubt regarding the Bureau's ability to complete both NRFU without sampling and ICM in time to meet the statutory deadline for transmittal of state-level population figures, it was surely reasonable for the Bureau to adopt a census plan that leaves some margin of safety, even if an alternative plan might produce slightly more accurate results for smaller geographical areas under a "best case" scenario.

is expected to improve the overall accuracy of the census.[10] Insofar as the correctness of the Bureau's judgment on that point is relevant to the issues presented by this case, that judgment warrants deference from this Court. Compare *Wisconsin* v. *City of New York*, 517 U.S. 23 (1995).[11]

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[10] The Census Bureau has a limited time to conduct the decennial census, since federal law requires that the population be determined as of April 1 of the census year and that complete state-level population counts be transmitted to the President within nine months after that date. See 13 U.S.C. 141(a) and (b). The Bureau is also restricted to the funds appropriated by Congress. See U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). Increases in the time and money devoted to the NRFU phase of the census necessarily entail decreases in the time and money available for the ICM phase. The Bureau's recognition of that elementary fact is not remotely comparable to a decision not to count "any people over 70 years old." Glavin Br. 43 n.40.

The 1997 GAO Report explained that "[t]he effects of the proposed sampling for nonresponse follow-up and of ICM procedures on the success of census operations and the quality of the resulting data need to be viewed in combination to be meaningful." 1997 GAO Report at 21. The Report stated that the decision to use NRFU sampling "is unlikely to significantly change (either improve or decrease) census accuracy," but emphasized that "ICM is unlikely to be successful unless preceding data collection efforts, in particular nonresponse follow-up, are completed on schedule." *Ibid.*; see also *id.* at 52 (noting that timely completion of NRFU is "crucial to the success of [ICM] * * * because the Bureau must provide the final census data for reapportionment and redistricting purposes by legislatively mandated deadlines").

[11] Contrary to appellees' suggestion (see Br. 3, 41), the 1997 GAO Report is strongly supportive of the Bureau's overall approach. Based on the results of the Bureau's research, the Report stated that

> the new statistical methods the Bureau proposes to use in the 2000 Census would likely produce results that appear more accurate or more equitable according to at least three broad criteria: (1) better average levels of error, (2) error distributions compressed closer to the average levels, and (3) an apparently better cumulative error distribution. For example, state population totals, which are the basis for apportioning seats in the House of Representatives, not only show lower error rates on average but also show much less variation in the error rates among states when compared to the undercount rates in the 1990 Census.

1997 GAO Report at 26. The Report observed as well that "Bureau evaluations of the 1990 Census indicated that simply adding more conventional counting operations was not effective in eliminating or reducing differential undercounts of areas and population groups that have been hard to enumerate accurately." *Id.* at 57-58; see also notes 3 and 10, *supra*.

B. Appellees Lack Standing To Bring This Suit

1. Appellees do not defend the district court's assertion (see J.S. App. 9a) that the States of Connecticut, Massachusetts, Minnesota, Missouri, Pennsylvania, and Wisconsin are substantially likely to lose a seat in the House of Representatives if sampling is used in the 2000 census. In a footnote, however, they continue to assert that the State of Indiana (in which appellee Hofmeister resides) "is virtually certain to lose a congressional seat solely as a consequence of the Department's methodology." Glavin Br. 14 n.11. The district court made no such finding. Moreover, as we explain in our opening brief (at 22-24), the Commerce Department introduced affidavits in the district court directly controverting the statistical analysis on which that contention is based. The Department's submission demonstrated in particular that appellees' affiant (Dr. Steven Weber) failed to consider the best available data, since he considered data from 1994 and ignored population estimates from 1997 that cast doubt on the accuracy of the Bureau's projections for the year 2000. See Gov't Br. 22-23 n.11.

Appellees defend their affiant's analysis on the ground that "Dr. Weber's methodology did in fact utilize the most recent *projections* available at the time of his analysis." Glavin Br. 14 n.11. That argument is specious. The situation might roughly be compared to a transaction in which an investor purchases shares in a mutual fund from a broker who projects that the investment will be worth $150,000 at the end of 1998, and $200,000 at the end of the year 2000. If the

shares are worth only $120,000 at the end of 1998, no reasonable investor would continue to rely on the $200,000 projection. Dr. Weber's analysis in effect presumes that so long as no new official population *projection* for the year 2000 has been issued, other newly-available evidence bearing on the likely accuracy of the earlier projection can safely be ignored. Given the obvious irrationality of that assumption, Dr. Weber's statement that "it is a virtual certainty that Indiana will lose a seat" if sampling is employed, J.A. 65, has no meaningful probative value.[12]

2. Appellees contend (Br. 10-13) that the appellee Georgia residents will be injured by the Bureau's plan for the 2000 census because (1) the State of Georgia will be entitled to an additional Representative (as compared to its current allotment) in the year 2002 regardless of how the census is conducted, and (2) the Bureau's failure to produce state-level population figures derived without the use of sampling will deprive the State of that Representative. Appellees' claim of "unconstitutional inaction" (Br. 11) as a basis for standing is both farfetched as a predictive matter and wrong as a legal matter. The Bureau's plan contemplates that a decennial census will be conducted; that the Secretary will transmit state-level population figures to the President, see

[12] Appellees suggest (Br. 5-6) that if their own suit is found not to be justiciable, no party will ever have standing to challenge the Bureau's decision to employ statistical sampling, even after the census is completed. Of course, "[t]he assumption that if [appellees] have no standing to sue, no one would have standing, is not a reason to find standing." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974)). But in any event, a potential plaintiff would have a substantially greater likelihood of demonstrating that the use of sampling had shifted a seat in the House of Representatives if the suit was filed after the completion of the census. The plaintiff might, for example, compare the apportionment resulting from the official census figures with the apportionment that would have resulted if the Bureau had not undertaken ICM. See note 13, *infra*.

13 U.S.C. 141(b); and that the President will in turn transmit state-level population figures to Congress, see 2 U.S.C. 2a(a). Under the existing reapportionment statute, "[e]ach State shall be entitled * * * to the number of Representatives shown in the statement" transmitted by the President. 2 U.S.C. 2a(b) (Supp. II 1996). Thus, if Georgia will be entitled to an additional Representative in the 2001 apportionment under any plausible census methodology, the State will receive that Representative by operation of law after the 2000 census is completed.

Georgia will lose that seat only if a federal court subsequently decides that (a) the use of sampling in the decennial census violated the Census Act or the Constitution *and* (b) the appropriate remedy for that violation is to mandate continued reliance on the 1990 census figures. Although appellees assert that "[t]he only remedial alternative" in that hypothetical suit "would be using the 1990 apportionment," they offer no legal argument in support of that proposition, which is contrary to basic equitable principles. See Gov't Br. 34.[13] Appellees have therefore failed to show that implementation of the Bureau's plan is likely to deprive Georgia of a Representative to which it would otherwise be entitled. Appellees also offer no authority for the proposition that Article III's traceability requirement can be satisfied in a particular case on the ground that the plaintiff

[13] The court in such a hypothetical future suit would instead be guided by the principle that relief should be tailored to place the parties in the position in which they would have been in the absence of a violation—here, if sampling had not been utilized in conducting the 2000 census. The data derived from the initial contact with every household, as well as the total of those figures and the additional data compiled from the in-person NRFU, will be available from the Census Bureau for that purpose. Moreover, since appellees have not alleged that NRFU sampling will injure them, the court in the hypothetical future suit could fashion a remedy by determining what apportionment of Representatives would have occurred if ICM sampling had not been used. Those data, unadjusted by the ICM process, will be available from the Census Bureau.

will likely be injured by the relief awarded in some hypothetical *other* suit in the future. See *id.* at 33-34.

3. The gravamen of appellees' claims on the merits is that the apportionment of Representatives among the States is a matter of special significance, and that the derivation of population figures to be used for that purpose is therefore subject to distinct constitutional and statutory rules. For the reasons stated above, however, appellees have failed to show a significant likelihood that *any* of the States in which they reside will be allotted fewer Representatives as a result of the Bureau's use of sampling than they would receive if sampling were not utilized. Indeed, appellees have all but abandoned any effort to predicate standing on such a claim of injury. Appellees' principal argument with regard to standing (Br. 14-26) is that they will suffer harms unrelated to the apportionment of Representatives among the States—*i.e.*, a loss of intrastate voting power and federal funding—as a result of the Bureau's plan.

As we explain in our opening brief (at 18-21, 24-26, 27-29), appellees have failed to demonstrate either that the States or localities in which they reside will lose population share as a result of the Bureau's use of sampling, or that any such decrease in population share will translate into a diminution of intrastate electoral power or loss of federal funds. Even if appellees could make that showing, however, they could not establish standing to sue. The injuries they allege would not be traceable to the purported illegality in the Bureau's plan, and they cannot demonstrate that a favorable judicial ruling would likely redress those harms.

a. With respect to the issue of traceability, our argument is not (as appellees suggest) that state or federal officials might decline to use "census numbers" (Glavin Br. 23) for intrastate redistricting or for the allocation of federal funds. Rather, our point is that the Census Act explicitly contemplates that census numbers calculated for those purposes should be derived through the use of sampling. Under 13

U.S.C. 195, the Secretary is required to use sampling "if he considers it feasible" for all purposes other than the apportionment of Representatives among the States. As a method for determining the population figures that will be used for intrastate redistricting and federal fund allocation, the Bureau's plan for the 2000 census is indisputably lawful. Even under appellees' interpretation of the Census Act and the Constitution, a violation of law will occur when and only when state-level population figures derived through sampling are used in the apportionment of Representatives among the States. Appellees' alleged intrastate electoral and funding "injuries"—which in fact would be entirely lawful consequences of the Secretary's actions—are not fairly traceable to such a violation.

b. As we explain in our opening brief (at 32), appellees' alleged intrastate electoral and federal funding injuries also would not be redressable by a favorable judicial decision, since the Census Bureau would remain free to utilize sampling for those purposes even if sampling for apportionment of Representatives among the States were held to be unlawful. Appellees argue (Br. 26 n.26) that if "the Court informs the Secretary that he must count *100%* of the population," the Secretary could not rationally decide to employ statistical sampling techniques to supplement that count. But that is simply wrong. Whatever the outcome of this case, the Court will not order the Secretary to "count 100% of the population"—a directive that is universally conceded to be incapable of implementation. Rather, acceptance of appellees' legal theory would require the Secretary to prepare state-level population figures derived without the use of sampling, which figures would be used in the apportionment of Representatives among the States. Nothing in law or in logic would prevent the Secretary from concluding that the use of sampling techniques as a supplement to the methodology used for apportionment would produce more accurate

numbers, and that those alternative figures should be calculated for all purposes permitted by law.[14]

C. The Principal Constraint On The Census Bureau's Discretion Is The Requirement That Its Decisions Be Reasonably Related To The Constitutional Goal Of Equal Representation For Equal Numbers Of People

Under 13 U.S.C. 141(a), the Secretary is directed to "take a decennial census of population * * * in such form and content as he may determine, including the use of sampling procedures and special surveys." Section 141(a) does not by its terms require that any specified percentage of the popu-

[14] If this Court holds that population figures derived through sampling may not be used in apportioning Representatives among the States, the Census Bureau will presumably conduct full non-response follow-up of all households that do not return mail questionnaires. Population figures derived through mail questionnaires and NRFU would then be used for interstate apportionment of Representatives. Appellees offer no reason to suppose, however, that the Bureau would forgo the use of ICM as a means of producing more accurate population counts to be used for other purposes. The Bureau's *Report to Congress* characterizes ICM as "the most critical" undertaking "[o]f all the innovations to improve accuracy in Census 2000." J.A. 92. As we explain above (see pp. 5-6, *supra*), the Bureau might well be unable to complete full NRFU and ICM in time to satisfy the January 1, 2001, deadline established by 13 U.S.C. 141(b). That deadline, however, applies only to "[t]he tabulation of total population by States * * * as required for the apportionment of Representatives in Congress among the several States." *Ibid.* The temporal constraint imposed by Section 141(b) would not prevent the Bureau from employing full NRFU and ICM to produce the population figures used for purposes other than apportionment.

Appellees suggest (Br. 26) that a judicial decision leading to such a "two-number census" would at least partially redress their injury, since the Census Bureau would be prohibited from making the *same* uses of sampling that it currently contemplates. But appellees' alleged injury is based solely on the Bureau's intent to use ICM, not on the anticipated effects of NRFU sampling. See note 5, *supra*. There is consequently no reason at all to suppose that a judicial order resulting in a two-number census would leave appellees in a better position than they would occupy if the Bureau's current plan were implemented.

lation must be contacted directly; nor does it specifically state that sampling may be employed only if it improves the accuracy of the final counts. Appellees contend (see Br. 34-35) that if the Census Act is construed to permit the use of sampling for purposes of congressional apportionment, the Census Bureau will be authorized to derive population figures for apportionment through sampling methodologies that demonstrably reduce the accuracy of the final population figures. That objection is misconceived.

The constitutional purpose of the census is to effectuate the requirement that Representatives be apportioned among the States "according to their respective Numbers," U.S. Const. Art. I, § 2, Cl. 3—a requirement that reflects "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives," *Wesberry* v. *Sanders*, 376 U.S. at 18. Although the Constitution does not require "a census that is as accurate as possible," *City of New York*, 517 U.S. at 17, use of a census methodology that is so inaccurate as to bear no reasonable relationship to the goal of equal representation for equal numbers of people would be unlawful, see *id.* at 19-20. The standard applied in *City of New York* leaves the Secretary with broad discretion, but that breadth of authority is scarcely accidental. It results from the facts that (a) "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,'" and (b) "[t]hrough the Census Act, Congress has delegated its broad authority over the census to the Secretary." *Id.* at 19 (citing 13 U.S.C. 141(a)). Thus, while there is no bright line between permissible and impermissible uses of sampling, the absence of such a bright line is the natural and inevitable consequence of Congress's decision to entrust the conduct of the decennial census to the sound judgment of the expert agency.

It should also be emphasized that potential line-drawing problems would not be eliminated by a prohibition on the use

of sampling. There are (at least in theory) "headcount" methodologies that would be impermissible under the standard articulated in *City of New York*. The Census Bureau could not, for example, lawfully conduct the decennial census by sending a single enumerator to each State. Nor could the Bureau permissibly decide that non-response follow-up would be conducted in some States (*e.g.*, States with Governors of the President's political party) and not in others. Neither of those methodologies is prohibited by any specific provision of the Census Act, but both would be palpably inconsistent with the goal of equal representation for equal numbers of people.

The fact that the Census Act contains no bright-line standards distinguishing between permissible and impermissible "headcounts" does not mean that the Bureau's authority in that regard is subject to no constraints whatever. It is obviously not an effective rejoinder to appellees' legal theory to say that their interpretation of the Census Act must be wrong because it would permit the Bureau to employ the techniques described above. By the same token, the possibility of hypothetical cases involving unreasonable sampling methodologies provides no ground for construing the Act to prohibit all use of sampling in connection with the apportionment of Representatives among the States.[15]

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[15] For essentially the same reasons, there is no merit to appellees' constitutional argument (Glavin Br. 47-48) that all forms of conjectural estimation will be permissible if this Court accepts the Commerce Department's interpretation of the phrase "actual Enumeration." Nor is there any basis for their suggestion (*id.* at 47 n.47) that the writings of Joseph Story support appellees' argument that apportionment of Representatives must be based on a "headcount." The first passage, from which appellees offer a partial quotation, states: "The third and remaining principle was to apportion the representatives among the States according to their relative numbers. *This had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion than any other which could be devised.*" 1 Joseph Story, *Commentaries on the Constitution of the United States* § 634, at 450 (1873 ed.) (emphasis added). The italicized language quoted by appellees refers to the requirement that the apportionment of Representatives be based on "numbers"—not (as appellees suggest, see Br. 47 n.47) to any particular "method" of ascertaining those numbers. The second passage on which appellees rely comes at the conclusion of Story's discussion of the difficulties of devising an appropriate mathematical formula for apportioning Representatives among the States after the census has been completed and final population figures determined. *Id.* § 678, at 475-476; compare *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 448-456 (1992). Story asserted that the "rule"—*i.e.*, the apportionment formula—"ought to be such that it shall always work the same way in regard to all the States, and be as little open to cavil or controversy or abuse as possible." 1 Story, *supra*, § 678, at 476. That passage likewise has nothing to do with the method by which the relevant population figures are ascertained.

D. 13 U.S.C. 195 Does Not Prohibit Sampling In Determining State-Level Population Figures For Apportioning Representatives Among The States

As we explain in our opening brief in No. 98-404 (at 28-31), the opening proviso of 13 U.S.C. 195 exempts the apportionment of Representatives among the States from the generally applicable directive that the Secretary must use sampling if it is "feasible," but it does not impose any prohibition on the use of sampling in that context. Section 195 therefore does not withdraw the authority expressly granted by Section 141(a) to use sampling in conjunction with the decennial census. Appellees argue that (1) an exception to a mandatory directive often constitutes a prohibition and (2) Section 195 does not contain a mandatory directive in any event. Those contentions are without merit.

1. Appellees state that "[t]here are numerous examples in the United States Code of statutes in which an exception from a mandate is a prohibition. *See, e.g.*, 22 U.S.C. § 5605(a)(1); 16 U.S.C. § 45(f); 7 U.S.C. § 79(j)(1); 22 U.S.C. § 2452(a)(1)." Glavin Br. 35 n.35. None of the cited provisions, however, can plausibly be read to divest Executive Branch officials of discretionary authority they would otherwise

possess. The exception contained in 22 U.S.C. 5605(a)(1) cannot reasonably be construed as a prohibition.[16] 16 U.S.C. 45f(c)(2)—the statutory provision to which appellees' citation to "16 U.S.C. § 45(f)" apparently refers—merely reflects the obvious fact that one does not pay market value for land that has been donated.[17] 7 U.S.C. 79(j)(1) merely reflects a self-evident proposition in the opposite situation—that the Secretary of Agriculture cannot charge a user fee for services he does not perform—and it does not in any event divest the Secretary of discretion he would otherwise possess.[18]

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[16] Section 5605(a)(1) addresses the situation where the President has determined, pursuant to 22 U.S.C. 5604(a)(1), that a particular foreign government has used chemical or biological weapons. Section 5605(a)(1) provides that "[t]he United States Government shall terminate assistance to that country under the Foreign Assistance Act of 1961 [22 U.S.C. 2151 et seq.], except for urgent humanitarian assistance and food or other agricultural commodities or products." Section 5605(a)(1) cannot plausibly be construed to *prohibit* the termination of food or agricultural assistance, if the appropriate Executive Branch official concludes that termination of such aid is warranted and if termination is otherwise permitted by law.

[17] Title 16 does not contain a Section 45(f). Section 45f(c)(1) authorizes the Secretary of the Interior to "acquire lands and interests in lands" in Mineral King Valley "by donation, purchase * * *, exchange, or transfer." Section 45f(c)(2) states that "[e]xcept for so much of the property as is donated, the Secretary shall pay to the owner the fair market value of the property on the date of its acquisition." Any *prohibition* against paying federal funds for donated property comes not from the statutory "except" clause, but from the Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7.

[18] Section 79(j)(1) applies to grain inspections undertaken by the Secretary of Agriculture. It states that "[t]he Secretary shall, under such regulations as the Secretary may prescribe, charge and collect reasonable inspection fees to cover the estimated cost to the Secretary incident to the performance of official inspection except when the official inspection is performed by a designated official agency or by a State under a delegation of authority." The immediately succeeding provision of the statute addresses the Secretary's entitlement to fees based on inspections undertaken by a designated official agency or by a State, and provides that the Secretary may collect fees from either to cover supervisory costs incurred by the Secretary. 7 U.S.C. 79(j)(2). Section 79(j)(1) and (2) therefore function as a coherent whole; the proviso in Section 79(j)(1) does *not* operate to prohibit the Secretary from exercising authority granted by another provision of the statute.

Finally, 22 U.S.C. 2452a(b) contains an exception to a discretionary authorization, not an exception to a mandate.[19]

The approach we advocate is based not on any artificial interpretive convention, but on simple common sense. With respect to any hypothetical Executive Branch action, Congress may choose to require the action, to prohibit the action, or to leave the decision to the discretion of Executive Branch officials. Absent very unusual circumstances, Congress's decision not to choose the first alternative does not, in and of itself, logically suggest any preference as between the other two. Where (as here) the pertinent Executive Branch conduct is specifically authorized by another provision of law (see 13 U.S.C. 141(a)), Congress's decision not to require that conduct cannot reasonably be construed to override the statutory authorization.

2. As we observe in our opening brief in No. 98-404 (at 28-29 n.14), Section 195's treatment of sampling for purposes other than congressional apportionment is neither wholly mandatory nor wholly non-directive. Contrary to appellees' contention (Br. 36-40), however, construction of Section 195's opening proviso does not turn on whether the rest of that Section is regarded as something approaching an absolute command or as a more conditional directive to use sampling.

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[19] Section 2452a(b) states: "The President is authorized to transfer to the appropriations account of the United States Information Agency such sums as the President shall determine to be necessary out of the travel accounts of the departments and agencies of the United States, *except for the Department of State and the United States Information Agency*, as the President shall designate." 22 U.S.C. 2452a(b) (emphasis added). The italicized proviso is an exception to the President's general discretionary authority ("The President is authorized") to transform funds from "the travel accounts of the departments and agencies of the United States." The fact that Section 2452a(b) contains the word "shall" does not make the proviso an exception to a mandate.

For even if Section 195 were regarded as purely hortatory—as nothing more than the expression of a non-binding congressional preference for sampling in doubtful cases—there is no reason to construe the opening proviso as prohibiting the use of sampling for apportionment of Representatives among the States.

With respect to functions other than the apportionment of Representatives, Congress sought to encourage the use of sampling in order to reduce the cost and burden of census activities, even in circumstances in which the Secretary does not believe that sampling would improve the accuracy of the count. See S. Rep. No. 1256, 94th Cong., 2d Sess. 5 (1976) (stating, with respect to the mid-decade census, that "the use of sampling procedures and surveys is urged for the sake of economy and reducing respondent burden"); see also *id.* at 9, 12, 13; 98-404 Comm. Dep't Br. 30. Given the particular constitutional significance of the apportionment of Representatives, however, Congress could reasonably determine that such a "thumb on the scale" was inappropriate, and that the Secretary should be left free to exercise his own best judgment regarding the appropriate methods for obtaining the most accurate population counts practicable. The fact that Congress declined to codify a *preference* for sampling in determining the population figures used for apportionment of Representatives does not logically imply that Congress intended to *prohibit* the use of sampling in that context.

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For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. In the alternative, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

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